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Nos. 82-1005, 82-1247 and 82-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEVRON U.S.A INC., a Corporation,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners.

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

[Counsel listed on Inside Cover]

August, 1983

Petitions for Certiorari filed December 15, 1982, January 25, 1983, March 25, 1983—Certiorari granted May 31, 1983

ROBERT A. EMMETT*
DAVID FERBER
REED SMITH SHAW & MCCLAY
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
(202) 457-6144
BLAIR S. MCMILLIN
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15129
(412) 288-3228
Of Counsel:
BARTON C. GREEN
General Counsel and Secretary
American Iron and Steel Institute
1000—16th Street, N.W.
Washington, D.C. 20036
(202) 452-7143
Attorneys for Petitioners American Iron and Steel Institute, et al.

STARK RITCHIE
DAVID T. DEAL
AMERICAN PETROLEUM INSTITUTE
2101 L Street, N.W.
Washington, D.C. 20037
Attorneys for Petitioners American Petroleum Institute, et al.

THEODORE L. GARRETT
PATRICIA A. BARALD
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
Attorneys for Petitioner Chemical Manufacturers Association

MICHAEL H. SALINSKY*
KEVIN M. FONG
PILLSBURY MADISON & SUTRO
225 Bush Street
P.O. Box 7880
San Francisco, CA 94120
(415) 983-1462
Attorneys for Petitioner Chevron U.S.A. Inc.

LOUIS E. TOSI
WILLIAM L. PATBERG
FULLER & HENRY
300 Madison Avenue
Toledo, OH 43603
Attorneys for Petitioner General Motors Corporation

CHARLES F. LETTOW
CLEARY, GOTTLIEB, STEEN & HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner Rubber Manufacturers Association

REX E. LEE*
Washington, D.C. 20530
(202) 633-2217
Attorney for Petitioner—Administrator, United States Environmental Protection Agency

DAVID D. DONIGER*
1725 I Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 223-8210
Attorney for Respondent Natural Resources Defense Council, Inc., et. al.

* Counsel of Record

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GENERAL DOCKET

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2208

NATURAL RESOURCES DEFENSE COUNCIL, INC.
CITIZENS FOR A BETTER ENVIRONMENT, INC.
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
Petitioners,

v.

ANNE M. GORSUCH, ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

AMERICAN PETROLEUM INSTITUTE, *et al.*,
AMERICAN IRON AND STEEL INSTITUTE,
RUBBER MANUFACTURERS ASSOCIATION, INC.,
GENERAL MOTORS CORPORATION,
ALABAMA POWER COMPANY, *et al.*,
CHEMICAL MANUFACTURERS ASSOCIATION,
Intervenors.

DATE	*FILINGS-PROCEEDINGS*
11-18-81	Petitioners' petition for review of an order of the EPA
11-25-81	Motion of Alabama Power Company, *et al.* for leave to intervene
12-01-81	Motion of Chemical Manufacturers Association for leave to intervene

12-09-81	Petitioners' motion for a stay and other relief pending review
12-09-81	Petitioners' memorandum in support of petitioners' motion for stay
12-09-81	Motion of the American Petroleum Institute, *et al.*, for leave to intervene
12-16-81	Motion of Rubber Manufacturers Association, Inc., for leave to intervene
12-17-81	Motion of American Iron and Steel Institute for leave to intervene
12-18-81	Motion of General Motors Corporation for leave to intervene as a respondent
12-22-81	Clerk's order that the motion of American Petroleum Institute, *et al.*, for leave to intervene is granted
12-22-81	Clerk's order that the motions of the American Iron and Steel Institute and the Rubber Manufacturers Association, Inc., for leave to intervene is granted
12-22-81	Clerk's order that the motion of General Motors Corporation for leave to intervene is granted
12-22-81	Intervenor's (Chevron-included in the motion to intervene by American Petroleum Institute) memorandum in opposition to petitioner's motion for a stay and other relief pending review
12-23-81	Respondent's memorandum in opposition to petitioners' motion for a stay and for other relief pending review
12-28-81	Certified Index to Record
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02-10-82	Petitioners' brief
02-16-82	Per Curiam order that the motion for stay pending appeal is denied.
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03-25-82	Intervenors' joint brief
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08-17-82	Opinion for the Court filed by Circuit Judge Ginsburg
08-17-82	Judgment ordering that the petition for review is granted and EPA's order of October 14, 1981 is vacated in accordance with the opinion of this Court filed herein this date
08-17-82	Mandate Order
09-30-82	Intervenor's (Chevron USA Inc.) petition for rehearing and suggestion for rehearing en banc
10-01-82	Respondent's petition for rehearing and suggestion for rehearing en banc
10-01-82	Intervenor's petition for rehearing and suggestion for rehearing en banc
10-27-82	Per Curiam order that the petition for rehearing of intervenor-respondent Chevron USA Inc. filed 9/30/82, is denied
10-27-82	Per Curiam order, en banc, that intervenor-respondent Chevron USA Inc. suggestion for rehearing en banc is denied
10-27-82	Per Curiam order that the petitions for rehearing filed by respondent and intervenor-respondents are denied
10-27-82	Per Curian order, en banc, that the suggestions for rehearing en banc of respondent and intervenor-respondents (other than Chevron USA Inc.) are denied
11-02-82	Intervenor's (Chevron USA Inc.) motion for stay of mandate
11-02-82	Respondent's motion to stay issuance of mandate
11-02-82	Intervenor's (American Iron and Steel Institute) motion for stay of mandate pending application for certiorari

11-09-82	Petitioners' corrected memorandum in opposition to further stay of the mandate
11-12-82	Intervenor's (Chevron USA Inc.) reply memorandum in support of stay of mandate
11-17-82	Intervenor's (American Iron and Steel Institute) reply to petitioners' opposition to motions to stay issuance of the mandate
11-17-82	Respondent's reply to petitioners' opposition to stay issuance of the mandate
11-17-82	Per Curiam order that the motions for stay of mandate are granted and the Clerk is directed not to issue the mandate herein for a period of thirty (30) days from the date of this order
12-23-82	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on 12-15-82 in SC No. 82-1005
01-25-83	Copy of letter from Clerk, Supreme Court dated 1-21-83 extending time to file petition of writ of certiorari to 3-26-83 in SC No. A-628
01-31-83	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed on 1-25-83 in SC No. 82-1247
04-04-83	Notice from Clerk, Supreme Court that petition for writ of certiorari was filed on 3-25-83 in SC No. 82-1591
06-03-83	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-1005 on 5-31-83
06-03-83	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-1247 on 5-31-83
06-03-83	Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 82-1591 on 5-31-83

A. Orders Of The United States Supreme Court Granting Certiorari:

1. Order of the United States Supreme Court Granting Certiorari, filed May 31, 1983 (No. 82-1005)

Supreme Court of the United States

No. 82-1005

CHEVRON U.S.A. INC.,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

ORDER ALLOWING CERTIORARI. Filed May 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-1247, *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, Inc., et al.* and case No. 82-1591, *William D. Ruckelshaus, Administrator, Environmental Protection Agency* v. *Natural Resources Defense Council, Inc., et al.*, and a total of one hour is alloted for oral argument.

2. Order of the United States Supreme Court Granting Certiorari, filed May 31, 1983 (No. 82-1247)

Supreme Court of the United States

No. 82-1247

AMERICAN IRON AND STEEL INSTITUTE, et al.,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

ORDER ALLOWING CERTIORARI. Filed May 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-1005, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.* and case No. 82-1591, *William D. Ruckelshaus, Administrator, Environmental Protection Agency* v. *Natural Resources Defense Council, Inc., et al.*, and a total of one hour is allotted for oral argument.

3. Order of the United States Supreme Court Granting Certiorari, filed May 31, 1983 (No. 82-1591)

Supreme Court of the United States

No. 82-1591

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

ORDER ALLOWING CERTIORARI. Filed May 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with case No. 82-1005, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.* and case No. 82-1247, *American Iron and Steel Institute, et al.* v. *Natural Resources Defense Council, Inc., et al.*, and a total of one hour is allotted for oral argument.

B. Federal Register Publications:

1. Emission Offset Interpretative Rule, 41 Fed. Reg. 55524 (December 21, 1976)

Title 40—Protection of Environment

CHAPTER 1—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 51—REQUIREMENTS FOR PREPARATION, ADAPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

Air Quality Standards; Interpretative Ruling

The Interpretative Ruling appearing below addresses the issue of whether and to what extent national air quality standards established under the Clean Air Act may restrict or prohibit growth of major new or expanded stationary air pollution sources. The ruling provides in general that a major new source may locate in an area with air quality worse than a national standard only if stringent conditions can be met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the standards. While the ruling is effective now, EPA is actively soliciting public comment on the ruling's basic policies and detailed provisions.

BACKGROUND

Section 110 of the Clean Air Act requires State Implementation Plans (SIP's) to insure that primary (health-related) national ambient air quality standards be attained as expeditiously as practicable, but not later than mid-1975 (except in those relatively few areas where an extension to mid-1977, at the latest, has been granted pursuant to § 110(e)). Sec-

ondary (welfare-related) ambient standards are to be met within a "reasonable time." Most SIP's have specified secondary standard attainment dates which are the same as the primary standard attainment dates.

Once the ambient standards have been attained, they must be maintained [section 110(a)(2)(B)]. By virtue of the Act's attainment and maintenance requirements and EPA's regulations appearing at 40 CFR 51.18, promulgated in August 1971, all SIP's must contain regulations requiring preconstruction review and disapproval of new or modified air pollution sources which would "interfere with" the attainment or maintenance of a national ambient air quality standard (NAAQS). Since the NAAQS attainment dates have already passed (or will soon pass) and the ambient standards have not been attained in many areas of the country, questions have arisen as to whether, and to what extent, new stationary sources may legally be permitted to construct in such areas. In response to these questions, EPA's interpretative ruling on the preconstruction review requirements of 40 CFR 51.18 is set forth below:

Public Participation and Review of Ruling

A draft of the ruling was sent to all State air pollution control agencies in April 1976, for review and comment. Their comments are available for public inspection at the EPA Public Information Reference Unit, 401 M Street, SW, Washington, D.C. 20460. In addition, EPA officials have discussed various drafts of the ruling in meetings with representatives of the State and Territorial Air Pollution Program Administrators, Association of Local Air Pollution Control Officials, National Governors Conference, National Conference of State Legislators, U.S. Conference of Mayors/National League of Cities, National Association of Counties, AFL-CIO, industrial groups, and environmental groups.

EPA recognizes that the ruling has profound national policy implications and that even more extensive public debate is needed on the issues of whether (and how) economic growth

may be accommodated where ambient air quality standards are being exceeded. EPA therefore is actively soliciting public comment on the ruling, in regard to both its basic policies and its detailed provisions. EPA may make adjustments to the ruling as warranted by the public comment. (Information regarding the nature and timing of the public comment is provided below.) EPA believes that these important national issues must ultimately be resolved by Congress through more explicit guidance in the Clean Air Act; hopefully, the publication of the ruling and the resulting public comments will provide a useful focus for legislative deliberations.

Implementation and Enforcement of Interpretative Ruling

In all but six SIP's, EPA has approved the State's own preconstruction review regulation adopted in conformance with 40 CFR 51.18. The ruling is therefore largely for the benefit of State and/or local reviewing authorities.[1] Only in the six states where EPA has been required to promulgate its own preconstruction review regulation in place of deficient State regulations will the provisions of the ruling be implemented directly by EPA (through its Regional Offices).

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[1] Since the SIP regulations were adopted to comply with 40 CFR 51.18 and this ruling articulates what 40 CFR 51.18 requires at a minimum, EPA feels that States should generally be able to implement the ruling's requirements without regulatory SIP amendments. Where a State desires to use the maximum flexibility provided in the ruling (States retain the right to impose stricter conditions), it will be up to the State to determine whether regulatory changes and/or a State "interpretative" ruling may be needed as a matter of State law. It should be noted that EPA is publishing advance notice of proposed amendments to 40 CFR 51.18 elsewhere in today's *Federal Register* (41 FR 55558) which, when finalized, will in all probability require amendments to SIP preconstruction review regulations. States may therefore wish to defer any regulatory amendments until the EPA rulemaking process is completed.

The ruling in no way requires a State or local reviewing authority to approve a source that meets the requirements set forth therein, since the authority to go beyond minimum Federal requirements is clearly protected by Section 116 of the Act. Available options, such as emission offsets, are allowable only at the discretion of local and State government. There are many reasons why a State or local authority might decide to prohibit a new source in addition to the criteria set forth in the ruling. Examples are the availability of alternative sites that are more environmentally acceptable, a decision that a proposed emission offset would not be in the best interest of the community, or a determination that allowing the new source would not in any case be in the best interest of the community.

Because interested parties in the public and private sector have (as noted above) been informally apprised of the basic provisions of the ruling and have had the opportunity to provide informal comments, and because the preconstruction review process is already being carried out under 40 CFR 51.18 (with continually-arising issues needing resolution), in EPA's judgment it is in the public interest to make the ruling immediately effective upon publication in the FEDERAL REGISTER. It would be highly impracticable merely to propose the ruling and defer its effectiveness, since both reviewing authorities and applicants for permits would be presented with even greater uncertainty in the interim period. As an articulation of the minimum requirements for preconstruction review of new sources pursuant to 40 CFR 51.18, the ruling's effect is to declare that any permits which are more lenient than allowed by the ruling fail to comply with the requirements of the Clean Air Act. Where a State issues (or has issued) a permit contrary to the Act's reqirements, EPA can take legal action to invalidate the permit and/or proceed against the affected source owner to prevent construction.

RESPONSES TO PRELIMINARY COMMENTS

In response to preliminary informal comments (discussed above), it would be helpful to briefly clarify or highlight

certain important points about the ruling. In some instances, new provisions have been added to earlier drafts in response to such comments.

1. *"Major" sources (Part II.B.).* The ruling provides that while all sources subject to SIP review requirements should be reviewed for emission limitation compliance, only "major" new sources must be subject to an ambient air quality analysis and the stringent requirements for lowest achievable emission rate, more than equivalent emission reductions, and assurance of reasonable progress toward NAAQS achievement. This is in recognition of the fact that reviewing authorities have limited resources and that smaller air pollution sources may individually have an insignificant impact on air quality. For the present, the ruling defines a "major" source as having an allowable emission rate of 100 or more tons per year (1000 for carbon monoxide).

In the notice set forth at 41 FR 55558 in today's FEDERAL REGISTER, however, EPA has tentatively proposed a definition of 50 or more tons per year (500 for carbon monoxide) to be incorporated into 40 CFR 51.18. It should thus be apparent that EPA has not finally determined that the 100-ton figure is the most appropriate, and States are strongly encouraged wherever resources permit to utilize a lower cut-off number. For the present, however, EPA will not legally require sources smaller than the 100-ton cut-off to undergo an air quality analysis.

2. *Lowest achievable emission rate (Part IV.A.1.).* The ruling provides that a major new source seeking to locate in an area violating an NAAQS must meet an emission limitation which reflects the "lowest achievable emission rate" for such type of source. At a minimum, the lowest rate achieved in practice would have to be specified unless the applicant can demonstrate that it cannot achieve such a rate. In no event could the rate exceed any applicable new source performance standard (NSPS) set under section 111 of the Act.

This stringent requirement reflects EPA's judgment that a new source should be allowed to emit pollutants into an area violating a NAAQS only if its contribution to the violation

is reduced to the greatest degree possible. While cost of achievement may be an important factor in determining an NSPS applicable to all areas of the country (clean as well as dirty) as a minimum, the cost factor must be accorded far less weight in determining an appropriate emission limitation for a source locating in an area violating statutorily-mandated health and welfare standards.

3. *Emission offset "Baseline" where EPA has called for a SIP revision or study (Part IV.C.4.).* The principle behind the emission offset concept is that new sources should be allowed offset credit only for emission reductions from existing sources which would not otherwise be accomplished as a result of the Clean Air Act. Therefore, where EPA has found that a SIP is substantially inadequate to attain a NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or has called for a study to determine the need for such a revision), the existing SIP emission limitations could not be used as the "baseline" for determining offset credits (as would normally be the case). Emission limitations representing reasonably available control measures, which most revised SIP's should soon require, should be used instead.

4. *No construction after January 1, 1979 without SIP revision (Part IV.A.5.).* The ruling provides that in those areas (discussed in paragraph 3 immediately above) where EPA has called for a SIP revision or study, no permit issued on or after January 1, 1979, may allow the source to commence construction until EPA has approved or promulgated a SIP revision. This condition merely recognizes the fact that the new source review requirements of 40 CFR 51.18 are carried out as an integral part of a SIP, the purpose of which is to attain the health-related NAAQS as expeditiously as practicable. Where a SIP is so inadequate that EPA has identified the need to have it revised, it is EPA's judgment that new major source growth must be deferred if the SIP revision is not accomplished in a timely manner.

The January, 1979, date is relevant since in most SIP revisions which EPA requested in July, 1976, States were

given until July 1, 1978, to submit all necessary SIP revision measures. Under the framework of the Clean Air Act, EPA would then have six months either to approve the State's revision or promulgate its own revision. In some areas, EPA may have called for a study of the need for a SIP revision but has not requested a revision on a specified schedule. If EPA calls for such a revision with a submission deadline of later than July 1, 1978, the ruling provides that the January 1, 1979, date would be correspondingly extended.

It can thus be seen that this condition provides a useful link between the 40 CFR 51.18 preconstruction review procedures and the SIP revision process. Where States are delayed in their efforts to revise their SIP's, the effect will be to delay the construction of any new major polluting sources in the affected areas.

5. *More than "One-for-One" emission offsets (Part IV.A.3.).* It should be stressed that this ruling is not a "status quo" or "one-for-one" emission offset rule for areas violating the Act's health and welfare standards. The ruling makes clear that the emission offset reductions must exceed the new source's emissions so as to represent reasonable progress toward attainment of the NAAQS.

6. *No "Banking" of emission offset credit (Part IV.C.6.).* The ruling allows no leftover emission offset credit to be "banked" for future pollution growth once an emission offset has been executed for a particular new source. To allow such "banking" would be inconsistent with a basic policy of the Act and the ruling—namely, that at a minimum, no new source should be allowed to make existing NAAQS violations any worse.

7. *"External" emission offsets (Part V).* Several commenting States were concerned over possible administrative and legal problems associated with "external" emission offsets (provided by sources not owned by the new source owner). There were questions as to whether (1) States could legally tighten emission limits for existing sources in order to permit the construction of a new, possibly competing, source; (2) a source could reasonably persuade a competing source to

further control its emission in order to permit the new source to be built; and (3) States would be required to develop a new regulation for each emission offset situation.

In response to these concerns, it should be noted that a State is not required to investigate emission offset possibilities as a result of each request to construct a new source. States may leave such arrangements to the proposed new source. It should be noted that in many cases the additional emission reduction can be obtained by improvements in a facility already owned by the developer of the new source. This would be particularly true in cases where the new emissions would come from expansion of an existing source. Where such intracompany emission offsets are not possible, the new source may be required to look elsewhere.

The State need not revise its regulations for each emission offset situation, but may use any available mechanism to obtain the necessary legally binding commitment (enforceable by EPA and private parties under the Clean Air Act) from the source providing the emission offsets. Finally, it should be noted that the ruling generally reflects the maximum flexibility permitted under the Clean Air Act, and the allowance for external emission offsets is an example of the flexibility that EPA has sought to provide. Although some States may find the provision for external emission offsets unworkable for various reasons, such flexibilty should be available to those States that wish to use it.

8. *Sources in "Clean" areas which could impact on areas exceeding a NAAQS.* Several States requested specific quantification as to the incremental level of pollution that would be considered an exacerbation of an existing violation of a national standard. This question is only applicable when a major source is to be located in a "clean" area, but might impact an area that exceeds a NAAQS some distance away (i.e., a major source locating in the middle of an area that exceeds standards clearly will exacerbate the existing violations).

Over the next several months, EPA intends to develop regulatory guidance for standardizing the modeling proce-

dures to be used in evaluating control strategies and in conducting new source reviews (with respect to both the NAAQS and regulations for preventing significant deterioration of air quality (see 40 CFR 52.21)). As part of this guidance, the issue of the "significance" of a source's air quality impact will be addressed. Until such guidance is available, reviewing agencies must make a reasonable cutoff on the geographic extent of the air quality calculations, based on a case-by-case analysis of such factors as the size of the source, the validity of the air quality predictions at long distances, and other relevant factors.

9. *"Fugitive Dust" problems.* Several States have expressed concern over the potential disapprovals of particulate matter sources planning to locate in rural areas that violate a particulate NAAQS due primarily to natural fugutive dust. The Agency has set forth a tentative proposal on this issue in the advance notice of proposed rulemaking appearing in today's FEDERAL REGISTER at 41 FR 55558. The intent at this time is to focus on urban areas and other areas that exceed the national standards for particulate matter as a result of man's activities. For the present, a State should consult the appropriate EPA Regional Office for guidance if the State is considering whether and to what extent the terms of the ruling should apply to particulate sources seeking to locate in rural areas. Where emission offsets are necessary, the Administrator finds no reason for not allowing credit from controlling existing fugitive emission sources, as long as all other requirements set forth in the ruling are met.

It should be noted that especially for particulate matter, the geographical representativeness of a given monitor is often somewhat limited; that is, just because a monitor records high concentrations, it is not necessary to assume that such concentrations occur over a wide geographical area. Where a monitor is not located close to the proposed new source, it may be more appropriate (provided accurate emission inventories are available) to estimate existing air quality using a model than to use data from a remote monitoring location.

10. *Geographic applicability of ruling for hydrocarbon*

sources. Because wide-spread violations of the NAAQS for photochemical oxidants have been found even in remote rural areas, some commentors have assumed that hydrocarbon control programs (including emission offset requirements) are necessary in all areas where there are violations of the photochemical oxidant standard. Based on the data available at this time, EPA believes that the rural oxidant problem is largely due to transport of oxidant or its precursors from major urban areas. Consequently a distinction can reasonably be made for control purposes between the extensive areas where an oxidant problem exists and the areas where much of the problem is created. As described in more detail in the notice appearing in today's FEDERAL REGISTER at 41 FR 55558, investigations are underway to determine the areas where hydrocarbon control programs will be most effective in reducing the highest oxidant concentrations. It is expected that the resulting guidance will focus on major metropolitan areas (larger than 200,000 population) extending as much as 85 miles from the largest urban centers. For the present, all of the provisions of the ruling must be applied to hydrocarbon sources seeking to locate within such areas that violate the oxidant NAAQS. The appropriate EPA Regional Office should be consulted if additional guidance is needed.

11. *No accommodation of new sources merely because primary NAAQS will eventually be achieved.* Some commenting States have argued that the Clean Air Act does not authorize EPA to adopt the stringent conditions of this ruling. The argument appears to be that even if a State has not achieved a primary NAAQS by the Congressionally-mandated deadline, the State may permit major new pollution sources to worsen present air quality so long as NAAQS achievement is projected for some time in the future.

EPA finds this argument totally untenable in light of the words of the Act, its legislative history, and Court decisions. The Act demands that each primary (health-related) NAAQS be achieved "as expeditiously as practicable" but in no event (if all extensions are allowed) later than mid-1977.

The Courts have continually emphasized that the Act

demands primary NAAQS achievement by a date certain. EPA simply cannot interpret the Act to allow a major new source to make an existing primary NAAQS violation worse after the Congressional date certain has passed, and therefore even further delay the overdue NAAQS achievement. The only plausible interpretation of the Act other than that reflected in the ruling is that no new sources should be allowed in a violating area.

In should be noted that the Act is more flexible with regard to the secondary (welfare-related) NAAQS's. This point is dealt with in Part VI of the ruling.

12. *No accommodation of new sources based on cost-balancing approach.* Some have argued that a new source should be allowed to worsen existing NAAQS violations if a "cost-benefit" analysis indicates that the economic costs of necessary emission controls or offsets are excessive in relation to the resulting air quality benefits. For much the same reason discussed in section 11 immediately above, the Clean Air Act simply does not allow such an approach. Application of such a policy could allow further delay in achieving already-overdue standards.

Particularly with regard to the primary NAAQS's, Congress and the Courts have made clear that economic considerations must be subordinated to NAAQS achievement and maintenance. While the ruling allows for some growth in areas violating a NAAQS if the net effect is to insure further progress toward NAAQS achievement, the Act does not allow economic growth to be accommodated at the expense of the public health.

While EPA cannot allow cost considerations to override public health concerns, EPA is sensitive to the cost impacts of the Clean Air Act. EPA plans to assess the economic impact of the ruling as it is implemented to determine whether adjustments can be made consistent with the law, and/or whether legislative amendments would be prudent.

Again, the Act is more flexible with regard to the secondary NAAQS's. A cost-benefit analysis may convince a state of the need to defer its SIP attainment date for the secondary NAAQS's. (See part VI of the ruling.)

Relationship to Other Preconstruction Reviews and SIP Requirements

Preconstruction review is also being implemented under EPA's regulations for preventing significant deterioration of air quality (40 CFR 52.21) and the national emission standards for hazardous air pollutants (40 CFR Part 61). In addition, voluntary reviews are being conducted for new sources subject to EPA's new source performance standards (40 CFR Part 60). In cases where States have been delegated the responsibility to implement these various programs, the reviews are being implemented at the State level. Where States have not accepted delegation, EPA retains the new source review responsibility. Certain types of sources may be subject to more than one of these regulations, and where the program responsibility rests with a single agency, the preconstruction reviews are normally carried out simultaneously. Even though a source may undergo simultaneous review under several of the above mentioned regulations, the provisions of this ruling are applicable only to the review required under 40 CFR 51.18. Thus a source may meet the requirements of the ruling, yet be disapproved because it does not meet the requirements of one of the other applicable regulations.

The ruling is not intended to replace the requirement for a SIP control strategy to attain and maintain standards. An individual emission offset must always result in reasonable progress toward attainment, but does not need to demonstrate that the NAAQS will be attained.

Since SIP control strategies must account for anticipated source growth, some questions may arise as to how new sources that are allowed to construct under the ruling should be dealt with in the revised SIP control strategies that EPA has recently requested. The projection and allocation of new sources and emissions should be carried out in the normal manner (see EPA's Air Quality Maintenance Guidelines, Vols. 7 and 13), although additional information on the size distribution of the new sources may be necessary. Where it is clear that a certain portion of the new sources and emissions will be subject to the terms of the ruling, the SIP control strategy

does not need to account for such emissions (since the emission offset requirements will ensure that such sources will not increase emissions in the area).

PUBLIC COMMENTS

EPA strongly encourages all interested parties and the general public to comment on both the general policies and the detailed provisions of the ruling appearing below. EPA may make adjustments to the ruling as warranted by the public comment. Written comments should be submitted (preferably in triplicate) no later than February 15, 1977, to: Environmental Protection Agency, Control Programs Development Division (MD-15), Research Triangle Park, N.C. 27711.

EPA plans to conduct informal public hearings on this ruling in several cities throughout the country in the next few weeks. Notice of the time, place, and format of such hearings will appear shortly in the FEDERAL REGISTER.

Finally, it is important to note that a notice appears in today's FEDERAL REGISTER at 41 FR 55558 which sets forth EPA's advance notice of certain proposed changes to 40 CFR 51.18. The issues discussed there bear upon some of the issues addressed in this ruling, and persons commenting on both notices are urged to prepare a single set of comments.

Dated: December 15, 1976.

RUSSELL E. TRAIN,
Administrator

INTERPRETATIVE RULING FOR IMPLEMENTATION OF THE REQUIREMENTS OF 40 CFR 51.18

I. INTRODUCTION

This notice sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution under 40 CFR 51.18. This ruling reflects EPA's judgment that the Clean Air Act allows a major new or modified source[1] to locate in an area that exceeds a national

[1] Hereafter the term "new source" will be used to denote both new and modified sources.

ambient air quality standard (NAAQS) only if stringent conditions can be met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that these will be progress toward achievement of the NAAQS.

II. INITIAL ANALYSIS AND APPLICABLE REQUIREMENTS

A. *Review of all sources for emission limitation compliance.* The reviewing authority must examine each proposed new source subject to the SIP preconstruction review requirements approved or promulgated pursuant to 40 CFR 51.18 to determine if such a source will meet all applicable emission requirements in the SIP. If the reviewing authority determines that the proposed new source cannot meet the applicable emission requirements, the permit to construct must be denied.

B. Review of major sources for air quality impact. In addition, for each proposed "major" new source or "major" modification, the reviewing authority must perform an air quality analysis[2] to determine if the source will cause or exacerbate a violation of a NAAQS. A proposed source which would not be a "major" source may be approved without further analysis, provided such a source meets the requirement of Part II.A.

The term "major source" shall, as a minimum, cover any structure, building, facility, installation or operation (or combinatiaon thereof) for which the allowable emission rate is equal to or greater than the following:

	tons per year
Particulate matter	100
Sulfur oxides	100
Nitrogen oxides	100
Non-methane hydrocarbons (organics)	100
Carbon monoxide	1,000

[2] Required only for those pollutants causing the proposed source to be defined as a "major" source, although the reviewing authority may address other pollutants if deemed appropriate.

Similarly a "major modification" shall include a modification to any structure, building, facility, installation or operation (or combination thereof) which increases the allowable emission rate by the amounts set forth above. A proposed new source with an allowable emission rate exceeding the above amounts is considered a major source under this ruling, even though such a source may replace an existing source with the result that the net additional emissions are increased by less than the above amounts.

Where a source is constructed or modified in increments which individually do not meet the above criteria, and which are not a part of a program of construction or modification in planned incremental phases previously approved by the reviewing authority, all such increments commenced after the date this ruling appears in the FEDERAL REGISTER or after the lastest approval issued by the reviewing authority, whichever is most recent, shall be added together for determining applicability under this ruling. Moreover, where there is a group of proposed sources which individually do not meet the above criteria, but which would be constructed in substitution for a major source, the group should be collectively reviewed as a major source.

Allowable annual emissions shall be based on the applicable New Source Performance Standard (NSPS) set forth in 40 CFR Part 60 or the applicable SIP emission limitation, whichever is less, and the maximum annual rated capacity of the source. If the source is not subject to either a NSPS or SIP emission limitation, annual emissions shall be based on (1) the maximum annual rated capacity, and (2) the emission rate agreed to by the source as a permit condition.

The following shall not, by themselves, be considered modifications under this ruling:

(1) Maintenance, repair, and replacement which the reviewing authority determines to be routine for a source category;

(2) An increase in the hours of operation unless limited by previous permit conditions;

(3) Use of an alternative fuel or raw material (unless limited

by previous permit conditions), if prior to the publication of this ruling in the FEDERAL REGISTER, the source is designed to accommodate such alternative use; or

(4) Change in ownership of a source.

C. Air quality impact analysis. For "stable" air pollutants (i.e., SO_2, particulate matter and CO), the determination of whether a source will cause or exacerbate a violation of a NAAQS generally should be made on a case-by-case basis as of the proposed new source's operation date using the best information and analytical techniques available (i.e., atmospheric simulation modeling, unless a source will clearly impact on a receptor which exceeds a NAAQS). This determination should be independent of any general determination of nonattainment or judgment that the SIP is substantially inadequate to attain or maintain the NAAQS. This is because the area affected by a determination of SIP inadequacy usually conforms to established administrative boundaries such as Air Quality Control Regions (AQCR's) rather than a precisely-defined area where air quality problems exist. For example, a SIP revision may be required for an AQCR on the basis of a localized violation of standards in a small portion of the AQCR. If a source seeks to locate in the "clean" portion of the AQCR and would not affect the area presently exceeding standards or cause a new violation of the NAAQS, such a source may be approved. For major sources of nitrogen opides, the initial determination of whether a source would cause or exacerbate a violation of the NAAQS for NO_2 should be made using an atmospheric simulation model assuming all the nitrogen oxide emitted is oxidized to NO_2 by the time the plume reaches ground level. The initial concentration estimates may be adjusted if adequate data are available to account for the expected oxidation rate. For major sources of hydrocarbons, see the discussion entitled "Geographic Applicability of Emission Offset Requirements for Hydrocarbon Sources" in the Notice appearing in today's FEDERAL REGISTER at 41 FR 55558.

III. SOURCES LOCATING IN "CLEAN" AREAS, BUT WOULD CAUSE A NEW VIOLATION OF A NAAQS

If the reviewing authority finds that the allowable emissions[3] from a proposed major source would cause a new violation of a NAAQS, but would not exacerbate an existing violation, approval may be granted only if both of the following conditions are met:

Condition 1. The new source is required to meet a more stringent emission limitation[4] and/or the control of existing sources below allowable levels is required so that the source will not cause a violation of any NAAQS.

Condition 2. The new emission limitations for the new source as well as any existing sources affected must be enforceable in accordance with the mechanisms set forth in Part V below.

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[3] Where a new source will result in specific and well defined indirect or secondary emissions which can be accurately quantified, the reviewing authority should consider such secondary emissions in determining whether the source would cause or exacerbate a violation of the NAAQS. However, since EPA's authority to perform indirect source review relating to parking-type facilities has been restricted by statute, consideration of parking-type indirect impacts is not required.

[4] If the reviewing authority determimes that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see Part V). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under Section 304. Hereafter, the term "emission limitations" shall also include such design, operational, or equipment standards.

IV. SOURCES THAT WOULD EXACERBATE AN EXISTING VIOLATION OF A NAAQS

A. *Conditions for approval.* If the reviewing authority finds that the allowable emissions[3] from a proposed source would exacerbate an "existing" violation (i.e., as of the source's proposed start-up date) of a NAAQS, approval may be granted only if all the following conditions are met:

Condition 1. The new source is required to meet an emission limitation which specifies the lowest achievable emission rate for such type of source.[3] In determining the applicable emission limitation, the reviewing authority must consider the most stringent emission limitation in any SIP and the lowest emission rate which is achieved in practice for such type of source. At a minimum, the lowest emission rate achieved in practice must be specified unless the applicant can sustain the burden of demonstrating that it cannot achieve such a rate. In no event could the specified rate exceed any applicable NSPS. Even where the applicant demonstrates that it cannot achieve the lowest emission rate achieved in practice, this in itself would not operate to raise the required emission limitation to the applicable NSPS. The "lowest achievable emission rate" requirement must still apply, and the applicant would retain the burden of demonstrating that it cannot achieve any rate more stringent than the NSPS rate.

Condition 2. The applicant must certify that all existing sources owned or controlled by the owner or operator of the proposed source in the same AQCR as the proposed source are in compliance with all applicable SIP requirements or are in compliance with an approved schedule and timetable for compliance under a SIP or an enforcement order issued under Section 113. The reviewing authority must examine all enforcement orders for sources owned or operated by the applicant in the AQCR to determine if more expeditious compliance is practicable. Where practicable, a more expeditious compliance schedule for such sources must be required as an enforceable condition of the new source permit.

Condition 3. Emission reductions ("offsets") from existing

sources in the area of the proposed source (whether or not under the same ownership) are required such that the total emissions from the existing and proposed sources are sufficiently less than the total allowable emissions from the existing sources under the SIP[5] prior to the request to construct or modify so as to represent reasonable progress toward attainment of the applicable NAAQS.[2] Only intrapollutant emission offsets will be acceptable (e.g., hydrocarbon increases may not be offset against SO_2 reductions).

Condition 4. The emission offsets will provide a positive net air quality benefit in the affected area (see Part IV.D. below).[2]

Condition 5. For a source which would be located in an area where EPA has found that a SIP is substantially inadequate to attain a NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or an area where EPA has called for a study to determine the need for such a revision), permits granted on or after January 1, 1979[6] must specify that the source may not commence construction until EPA has approved or promulgated a SIP revision for the area (if the source is a major source of the pollutant subject to the call for revision or study).

B. *Exemptions from certain conditions.* The reviewing authority may exempt a source from Condition 1 under Part III or Conditions 3 and 4 under Part IV.A., in cases where the source must switch fuels due to lack of adequate fuel supplies or where the source is required as a result of EPA regulations (i.e., lead-in-fuel requirements) to install additional process equipment and no exception from such an EPA regulation is available to the source. Such an exemption may be granted only if: (i) the applicant demonstates that it made its best efforts to obtain sufficient emission offsets to comply with Condition 1 under Part III or Conditions 3 and 4 under Part IV.A and that such efforts were unsuccessful; (ii) the

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[5] Subject to the provisions of Part IV.C. below.

[6] Or, if later, the date which is six months after the deadline for submittal of the revision.

applicant has secured all available emission offsets; and (iii) the applicant will continue to seek the necessary emission offsets and apply them when they become available. Such an exemption may result in the need to revise the SIP to provide additional control of existing sources.

C. *Baseline for determining credit for emission offsets.* Except as provided below, the baseline for determining credit for emission and air quality offsets will be the SIP emission limitations in effect at the time the application to construct or modify a source is filed. Thus, credit for emission offset purposes may be allowable for existing control that goes beyond that required by the SIP.

1. *No applicable SIP requirement.* Where the applicable SIP does not contain an emission limitation for a source or source category, the emission offset baseline involving such sources shall be the actual emissions at the time the permit request is filed (determined by source test or other appropriate means).

2. *Combustion of fuels.* Generally, the emissions for determining emission offset credit involving an existing fuel combustion source will be the allowable emissions under the SIP for the type of fuel being burned at the time the new source application is filed (i.e., if the existing source has switched to a different type of fuel at some earlier date, any resulting emission reduction [either actual or allowable] shall not be used for emission offset credit). If the existing source commits to switch to a cleaner fuel at some future date, emission offset credit, based on the allowable emissions for the fuels involved, is acceptable; provided, that the permit must be conditioned to require the use of a specified alternative control measure which would achieve the same degree of emission reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emission offset credit for fuel switches.

Where the particulate emission limit for fuel combustion exceeds the appropriate uncontrolled emission factor in "Compilation of Air Pollutant Emission Factors" (AP-42) (as when

a State has a single emission limit for all fuels), emission offset credit will only be allowed for control below the appropriate uncontrolled emission factor in AP-42. (Actual emissions determined by a source test may be used in place of the uncontrolled emission factor in AP-42 in the above situation.)

3. *Operating hours and source shutdown.* Emission offsets generally should be made on a pounds-per-hour basis when all facilities involved in the emission offset calculations are operating at their maximum expected production rate. The reviewing agency should specify other averaging periods (e.g., tons per year) in addition to the pounds-per-hour basis if necessary to carry out the intent of this ruling. A source may be credited with emission reductions achieved by shutting down an existing source or permanently curtailing production or operating hours below that which existed at the time the new source application was submitted; provided, that the work force to be affected has been notified of the proposed shutdown or curtailment. Emission offsets that involve reducing operating hours or production or source shutdowns must be legally enforceable, as is the case for all emission offset situations.[7] Nothing contained in this ruling is intended to alter EPA's interpretation of the Clean Air Act with regard to the use of "supplemental control systems" or "stack height increases" as set forth at 41 FR 7450 (February 18, 1976).

4. *EPA has requested a SIP revision (or study).* Where EPA has found that a SIP is substantially inadequate to attain a NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or EPA has called for a

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[7] Source shutdowns and curtailments in production or operating hours occurring prior to the date the new source application is filed generally may not be used for emission offset credit. However, where an applicant can establish that it shut down or curtailed production after SIP approval as a result of enforcement action providing for a new source as a replacement for the shut down or curtailment, credit for such shut down or curtailment may be applied to offset emissions from the new source.

study to determine the need for such a revision) the baseline for emission offset credit involving sources of the relevant pollutant will be the emissions resulting from the application of reasonably available control measures. The intent of this requirement is to prevent sources from receiving emission offset credit against an inadequate SIP and nullifying the gains that will be achieved through the required SIP revision. In effect, States should use the anticipated SIP revision as the baseline for emission offset credit until such time as the SIP is formally revised.

5. *Credit for hydrocarbon substitution.* EPA has found that almost all non-methane hydrocarbons are photochemically reactive and that low reactivity hydrocarbons eventually form as much photochemical oxidant as the highly-reactive hydrocarbons. Therefore, no emission offset credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity.

6. *No "banking" of emission offset credit.* Once an emission offset has been executed for a particular new source, there can be no leftover credit to "bank" for additional new source growth in the future. This "no banking" rule would not prohibit, however, the issuance of a single permit to cover more than one phase of a phased-construction project.[8] Similarly, for State-initiated emission offsets (see Part V.B.), several different sources may be allowed to construct as part of a general SIP revision, so long as the plans for each source are definite and such sources are specifically identified as the recipients of the emission offset credits in the SIP revision.

D. *Geographic area of concern.* In the case of emission offsets involving hydrocarbons or NO_x, the offsets may be obtained from sources located anywhere in the broad vicinity of the proposed new source (within the area of non-attainment, and usually within the same air quality control region). This is because areawide oxidant and NO_2 levels are generally not as dependent on specific hydrocarbon or NO_x source location

[8] If any phase covered by the permit is for any reason not constructed, there would be no resulting credit to "bank."

as they are on overall area emissions. However, since the air quality impact of SO_2 particulate and carbon monoxide sources is site dependent, simple areawide mass emission offsets are not appropriate. For these pollutants, the reviewing authority should require atmospheric simulation modeling to ensure that the emission offsets provide a positive net air quality benefit. However, to avoid unnecessary consumption of limited, costly and time consuming modeling resources, in most cases it can be assumed that if the emission offsets are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height, the air quality test under Condition 4 in Part IV.A above will be met. Thus, when stack emissions are offset against a ground level source at the same site, modeling would be required.

E. *Reasonable progress towards attainment.* As long as the emission offset is greater than one-for-one, and the other criteria set forth above are met, EPA does not intend to question a reviewing authority's judgment as to what constitutes reasonable progress towards attainment as required under Condition 3 in Part IV.A above. Reviewing authorities should bear in mind, however, that the control achieved through emission offsets can significantly assist the authorities in developing legally acceptable SIP's.

V. ADMINISTRATIVE PROCEDURES

The necessary emission offsets may be proposed either by the owner of the proposed source or by the local community or the State. The emission reduction committed to must be enforceable by authorized State and or local agencies and under the Clean Air Act, and must be accomplished by the new source's start-up date.

A. *Source initiated emission offsets.* A source may propose emission offsets which involve (1) reductions from sources controlled by the source owner (internal emission offsets); and/or (2) reductions from neighboring sources (external emission offsets). The source does not have to investigate all

possible emission offsets. As long as the emission offsets obtained represent reasonable progress toward attainment, they will be acceptable. It is the reviewing authority's responsibility to assure that the emission offsets will be as effective as proposed by the source. An internal emission offset will be considered enforceable if it is made a SIP requirement by inclusion as a condition of the new source permit and the permit is forwarded to the appropriate EPA Regional Office.[9] An external emission offset will not be accepted unless the affected source(s) is subject to a new SIP requirement to ensure that its emissions will be reduced by a specified amount in a specified time. Thus, if the source(s) does not obtain the necessary reduction, it will be in violation of a SIP requirement and subject to enforcement action by EPA, the State and/or private parties. The form of the SIP revision may be a State or local regulation, operating permit condition, consent or enforcement order, or any other legally enforceable mechanism available to the State. If a SIP revision is required, the public hearing on the revision may be substituted for the normal public comment procedure required for all major sources under 40 CFR 51.18. The formal publication of the SIP revision approval in the FEDERAL REGISTER need not appear before the source may proceed with construction. To minimize uncertainty that may be caused by these procedures, EPA will, if requested by the State, propose a SIP revision for public comment in the FEDERAL REGISTER concurrently with the State public hearing process. Of course, any major change in the final permit/SIP revision submitted by the State may require a reproposal by EPA.

B. *State or community initiated emission offsets.* A State or community which desires that a source locate in its area

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[9] The emission offset will therefore be enforceable by EPA under Section 113 as an applicable SIP requirement and will be enforceable by private parties under Section 304 as an emission limitations. EPA will publish notice of such emission offsets in the FEDERAL REGISTER.

may commit to reducing emissions from existing sources to sufficiently outweigh the impact of the new source and thus open the way for the new source. As with source-initiated emission offsets, the commitment must be something more than one-for-one. This commitment must be submitted as a SIP revision by the State.

The provisions of Part IV.C.4 above remain applicable to State or community initiated emission offsets. Therefore, where EPA has found that a SIP is substantially inadequate to attain an NAAQS and has formally requested a SIP revision pursuant to Section 110(a)(2)(H)(ii) (or has called for a study to determine the need for such a revision), the resulting emission reduction may not be used as an emission offset.

VI. POLICY WITH RESPECT TO SECONDARY STANDARDS

The statutory attainment dates for the primary NAAQS have now passed or will pass very soon and cannot be administratively extended. Therefore, this ruling does not allow a new source to cause or exacerbate a primary NAAQS violation on the grounds that the SIP will eventually achieve the NAAQS (as may have been permitted in some cases before the statutory attainment dates).

The Act provides more flexibility with respect to secondary NAAQS's. Rather than setting specific deadlines, Section 110 requires secondary NAAQS's to be achieved within a "reasonable time." Under 40 CFR 51.13(b), a State may revise its SIP to provide extensions from its present secondary NAAQS deadlines. If, therefore, a State submits (and EPA approves) such a revision, a new source which would cause or exacerbate a secondary NAAQS violaion may be exempt from the Conditions of Part IV.A. so long as the new source meets the applicable SIP emission limitations and will not interfere with attainment by the newly-specified date.

[FR Doc. 76-37346 Filed 12-20-76; 8:45 a.m.]

2. Amended Emission Offset Interpretative Rule (excerpted), 44 Fed. Reg. 3274 (January 16, 1979)

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION AND SUBMITTAL OF IMPLEMENTATION PLANS

Emission Offset Interpretative Ruling

Agency: Environmental Protection Agency.
Action: Final Rule.
Summary: This rule describes the requirements for preconstruction review which apply to large new (or modified) air pollution sources affecting areas with air quality worse than the levels set to protect the public health and welfare. The action makes certain revisions to ERA's Emission Offset Interpretative Ruling of December 21, 1976 (41 FR 55524). These revisions are a result of the public comments (including four public hearings) on the December 21, 1976, Interpretative Ruling and changes required by the Clean Air Act Amendments of 1977 (Pub. L. 95–95, note under 42 U.S.C. 7401).
DATES: These changes are applicable to permits applied for on or after January 16, 1979. States may, if they so desire, make these changes applicable on a retroactive basis unless specified otherwise in the Ruling. Comments on specified issues should be submitted in accordance with the proposal published elsewhere in today's FEDERAL REGISTER.

FOR FURTHER INFORMATION CONTACT:

D. Kent Berry, Office of Air Quality Planning and Standards, Environmental Protection Agency. Mail Drop 11, Research Triangle Park. North Carolina 27711, Telephone: 919-541-5341.

SUPPLEMENTARY INFORMATION: On December 21, 1976, EPA issued an Interpretative Ruling (41 FR 55524) addressing the issue of whether and to what extent national ambient air quality standards (NAAQS) established under the Clean Air Act may restrict or prohibit construction of major new or modified stationary air pollution sources. The Ruling provides, in general, that a major new source, which emits pollutants in excess of specified amounts and would otherwise contribute to an existing violation of a national standard, may be constructed only if stringent conditions can be met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the standards. Where such a source would otherwise cause a new violation of an NAAQS, offsets or additional control must be provided to prevent a new violation of the standards.

Although this Ruling was made immediately effective, the Agency solicited written comments and held public hearings in San Francisco, Dallas, Chicago, and New York. The comments received (including a summary of those comments) and the public hearing records are available for public inspection and copying during normal business hours at: Public Information Reference Unit, Environmental Potection Agency, Room 2922 (EPA Library) 401 M Street, SW., Washington, D.C. 20460.

Permits Required for New or Modified Air Pollution Sources

The Federal Clean Air Act and most State regulations require that new air pollution sources and modifications of existing sources which would increase air pollution emissions must obtain a permit *before construction is begun*. The State (or local) new source review procedures apply to almost all new or modified air pollution sources. This review is intended to ensure that new sources will meet all applicable air pollution regulations adopted by the States. In addition, larger sources

(which will have increased emissions of 50 tons per year of any air pollutant)[1] will be subject to more stringent requirements relating to the source's impact upon air quality.

A given source may have air pollution impacts in an area which has clean air or in an area which has dirty air. Some sources can affect both types of areas. The type of review requirements that a new source must comply with depends on whether the source affects a dirty air or clean air area. A source which impacts an area where the air is cleaner than the national ambient air quality standards (NAAQS) is subject to regulations for preventing significant deterioration (PSD) of air quality.[2] The purpose of these regulations is to keep clean air clean and the primary focus is to limit new emissions of sulfur oxides and particulate matter.

A new source that would affect a dirty air area will also be subject to EPA's Emission Offset Interpretative Ruling, the main provisions of which require the new source to meet the lowest achievable emission rate for the problem pollutant(s) and to obtain more than equivalent offsetting emission reductions (emission offsets) from existing sources. A source may be subject to PSD for one pollutant and to the Offset Ruling for another pollutant, or may affect both clean and dirty areas for the same pollutant.

At the present time, the Offset Ruling is generally carried out by the States as part of their own new source review procedures. In most areas, EPA's Offset Ruling will terminate as of July 1, 1979, and will be replaced by State-adopted new source review requirements. However, if States fail to adopt an acceptable plan to attain the NAAQS by the dates specified in the Clean Air Act, the Act requires that no permits for major new sources applied for after June 30, 1979 be issued.

The PSD program is generally being carried out by EPA through its Regional Offices. Thus, large sources must now

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[1] The criteria for determining the applicability of these more stringent requirements are actually more complex and can be found in the specific regulations mentioned below.

[2] See Federal Register of June 19, 1978, pp 26380-26410.

get a preconstruction permit from both the State (for offsets) and EPA (for PSD). However, many States will be developing their own PSD program, allowing the air permit program to be consolidated at the State level. Until this occurs, major source owners should obtain their State permit before applying to EPA for a PSD permit. It is recommended that source owners consult with both EPA and the States before submitting a permit application to determine what requirements will be applicable and what kind of information must be submitted. To avoid delays, major source owners should apply for a permit as early in their planning process as possible and should allow for a minimum of three months from the date of application for a permit to be issued.

Immediately Effective Changes Resulting from 1977 Clean Air Act Amendments

1. *Baseline.* In the December 21, 1976 Ruling, the baseline for determining emission offset credit was the SIP emission limitations in effect for existing sources (i.e., control of existing sources beyond that required by the SIP could be used to offset emissions from new sources). However, for areas where EPA had formally found the State plan inadequate and had requested revision, the baseline was the emissions that would result from application or reasonably available control measures (RACM) by existing sources. Furthermore, even where the baseline was the existing SIP rather than RACM, the 1976 Ruling provided for several adjustments to the baseline to take account of unusual circumstances. Explicit provisions were included to govern situations where there was no applicable SIP requirement, where offset credit would come from switching to cleaner fuels, and where the permitted emission level exceeded the uncontrolled emission factor of the source. 41 FR at 55529 cols. 2–3. In addition, EPA does not interpret the 1976 Ruling as allowing offset credit for tightening SIP requirements for a source to reduce the emission level allowed by the SIP down to the level allowed for the source by applicable new source performance standards (NSPS) or national emission

standards for hazardous air pollutants (NESHAPS) requirements (i.e., requirements under Sections 111 and 112, respectively, of the Act). Any other approach would allow offset credit for so-called "paper" reductions, where the SIP is adjusted but no actual tightening of requirements under the Act occurs. These special provisions all implement the general principle behind the 1976 Ruling, that offsets must ordinarily represent reductions in emissions below the emissions allowed by existing requirements.

Section 129(a)(1) of the Clean Air Act Amendments of 1977 (Pub. L. 95–95 (note under 42 U.S.C. 7502)) states that the 1976 Ruling, as it may be modified, shall remain in effect, except that the baseline for determining emission offset credit "shall be the applicable implementation plan of the State in effect at the time of application for a permit * * *." The legislative history indicates that this provision was intended to eliminate the provision in the 1976 Ruling that the baseline was RACM where EPA had called for a SIP revision. But this provision was not intended to displace the provisions under the 1976 Ruling to accommodate special circumstances, giving credit only for reductions below the emissions allowed by existing requirements.

For the foregoing reasons, the ruling is revised to eliminate the requirement that the baseline by RACM where EPA has called for SIP revisions.[3] EPA invites public comment on its policy that the Ruling does not allow offset credit for tightening SIP requirements down to NSPS or NESHAPS levels, and invites comment on whether the language of the Ruling establishing the baseline should be revised to make this policy more explicit.

2. *Nonattainment requirements under the amended Act.—a. Amendments required by nonattainment provisions of the*

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[3] The 1977 Amendments and legislative history clearly call for this Amendment. See 123 Congressional Record at S 9165 col. 2 (daily ed. June 6, 1977), therefore, EPA has determined that notice and public procedure are unnecessary before making this Amendment.

Act. New Part D of Title I of the Act[4] requires States to revise their SIP's for every area where an NAAQS is not being met. For each standard, areas were designated, under Section 107(d) and 171(2) of the Act, as either attaining the standard (attainment areas), violating the standard (nonattainment areas), or areas that cannot be classified on the basis of available information (unclassifiable areas).[5] For areas initially designated as nonattainment areas,[5] the deadline for States to submit required SIP revisions is January 1, 1979. Revised SIP's meeting the requirements of Part D must be in effect by July 1, 1979. For areas initially designated as attainment or unclassifiable but are later found to be nonattainment areas, additional time may be necessary for development, submittal and approval of the required SIP revisions.

The Act provides that the Ruling be superseded after June 30, 1979—(a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of Part D, or (b) by prohibition on construction under the Applicable SIP and Section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of Part D. The Ruling is now being amended to reflect this, and to state that the Ruling will remain in effect to the extent not superseded under provisions of the Act. The above prohibition on major new source construction does not apply to a source whose permit for construction or modification was applied for duing a period when the SIP was in compliance with Part D, or before the deadline for having a revised SIP in effect that satisifies Part D. The Ruling is amended to reflect this.[6]

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[4] Part D of the Act, which includes Sections 171 through 178 (42 U.S.C. 7501–7508).

[5] Initial designations were published by EPA on March 3, 1978, 43 FR 8962. Revisions to the initial designations were recently published for some States (43 FR 40412, 43 FR 40502, and 43 FR 45993, September 11 and 12, and October 5, 1978) and will soon be published for other States. Designations are codified at 40 CFR 81.300 *et seq.*

[6] These amendments to the Ruling do no more than state that the Act provides for supersession of this Ruling. Furthermore, it

b. *Additional effects of nonattainment requirements on this Ruling.* By its terms, this Ruling has always applied to proposed major sources and major modifications anywhere in the State that will cause or contribute to a violation of an NAAQS, regardless of whether the sources or modifications were within an area determined in general to be nonattainment. 41 FR 55528 col. 2. Designations of nonattainment, therefore, do not limit the areas within which this Ruling applies.

In EPA's view, the Act requires that for any area disignated [sic] as nonattainment for any NAAQS, the preconstruction review provisions under Part D, or the prohibition on construction under the applicable SIP and Section 110(a)(2)(I), must apply to all major sources within the State that will cause or contribute to a violation of the NAAQS within an area initially designated as a nonattainment area. Consequently, after July 1, 1979, the Interpretative Ruling will only apply in the following situations: (a) To sources in one State which contribute to a violation of an NAAQS only with another State, (b) during the time allowed for the development and approval and/or promulgation of revised SIP in an area which is subsequently determined to violate an NAAQS, and (c) during any extended time allowed under Section 110(b) for development of a SIP revision of an area that violates only a secondary NAAQS. Also, for sources in one state (which has an acceptable SIP) that would contribute to a violation in another State (which does not have an acceptable SIP), the restrictions on new source construction under the applicable SIP and Section 110(a)(2)(I) do not apply.

Under the preconstruction permit requirements in Part D, States have two basic options for dealing with proposed new

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is important to have a clear statement at this time of the earliest possible application of the prohibition on major new source construction, to assist industrial planning. For these reasons, EPA has determined that soliciting public comment before making these amendments would be unnecessary and contrary to the public interest.

major sources within a nonattainment area that cause or contribute to a violation of an NAAQS. The SIP may provide an allowance for growth while assuring reasonable further progress toward attainment, and new sources may be allowed that do not result (individually or in the aggregate) in emissions that exceed the allowance. If the growth allowance is used up, or if none is provided, the State's other option is to allow sources to be constructed only if case-by-case offsets are obtained sufficient to provide for reasonable further progress towards attaining the NAAQS by the attainment date prescribed under Part D. If the SIP for the nonattainment area is not being carried out, however, no permits may be issued within the area as required by Section 173(4).

The discussion in this notice of the requirements for revised SIP's under Part D, and for a prohibition on construction under the applicable SIP and Section 110(a)(2)(I), is provided to place the Ruling in perspective, and does not constitute regulations promulgated or final action taken by the Administrator to establish or interpret those requirements. Many of the approaches used by the Agency in revising the Ruling may be used by the States as guidance in developing provisions under Part D; but again, except as noted below, this does not constitute regulations or final action establishing or interpreting requirements for preconstruction review provisions. The Agency's nationally applicable policy summarizing the elements that a SIP submittal must contain to meet the requirements of Part D was published in the FEDERAL REGISTER on May 19, 1978, 43 FR 21673, and the discussion and guidance provided by this notice merely supplement that policy.

The only exception is that certain terms in the Ruling are also used in Sections 172(b)(6), 173, and 302(j) of the Act to prescribe the requirements for revised preconstruction review provisions. Therefore, the definitions in this ruling of the terms "source," "potential," and "modification" (see discussion below on additional flexibility in defining "modification") apply to the statutory requirements for preconstruction review provisions under Sections 110(a)(2)(I) and Part D as well as

under this Ruling. The discussion below of "lowest achievable emission rate," and of cut-offs to limit review of small sources, also apply to State preconstruction review programs under Section 173 of the Act [although not to the prohibition on construction under Section 110(a)(2)(I)].

MAJOR SOURCE ISSUES

1. *Sources subject to review—a. Definition of "potential" to emit and definition of cutoff points.* Section 129(a) of the 1977 Amendments requires that the offset requirements be applicable to all major stationary sources (including Federal facilities) as defined in Section 302 of the Act (i.e., sources with potential emissions of 100 tons or more per year). The emission offset requirements currently apply to sources with *allowable* emissions greater than 100 tons per year. Since the 1977 Act Amendments did not define potential emissions and there has been some question as to the Congressional intent of this term, this change was not made immediately effective. However, this issue was dealt with in EPA's proposed regulations for preventing significant deterioration (PSD) of air quality (42 FR 26388). As set forth in the final PSD regulations, potential emissions are defined in terms of uncontrolled emissions but sources are exempt from the best available control technology and the air quality related tests if the source's allowable emissions would be less than each of the following cutoff points: 50 tons per year, 1000 pounds per day or 100 pounds per hour. The short-term criteria are included to ensure that a source that operates seasonally or intermittently is adequately dealt with regarding its impact on short-term air quality. For the same reasons as are discussed in the preamble to the PSD regulations, the Emission Offset Ruling is revised to require review of sources based on their uncontrolled emissions, but to exempt sources from the major conditions of the Ruling if the allowable emissions are less than the above cutoff points.

It should be noted that any source with allowable emissions less than the above amounts which is exempted from the offset requirements will use up part of the state's allocation

for growth (see discussion in preceding section) at the time such source begins operation. Thus, a State plan may need to require additional control of existing sources (or more rapid compliance) in order to achieve the "annual reasonable further progress toward attainment" required by the Act.

b. *Definition of "source."* A number of commenters indicated the need for a more explicit definition of "source." Some readers found that it was unclear under the 1976 Ruling whether a plant with a number of different processes and emission points would be considered a single source. The changes set forth below define a source as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." This definition precludes a large plant from being separated into individual production lines for purposes of determining applicability of the offset requirements.

The revised definition of "source" is only a clarification, and represents no change from EPA's intent in the December 1976 Ruling and the way the Ruling has been implemented. The definition is consistent with the use of this term in other SIP-related regulations (e.g., 40 CFR Part 51, Appendix C), and is identical to the approach recently adopted for the Prevention of Significant Deterioration (PSD) regulations (see 40 CFR 52.21 (b)(4), 43 FR 26388, June 19, 1978).

c. *Public comment.* Comments were originally solicited on the definition of cut-off points to limit review of small sources in the Advance Notice of Proposed Rulemaking published on December 21, 1976. 41 FR 55559. Comments were received on the definition of "source" in the 1976 version of this Ruling. The definitions of the term "potential" and "source," and the definition of cut-off points to limit review, were all the subject of extensive public comment in response to EPA's proposed PSD regulations, which contained an approach very similar to that adopted here. The definitions adopted here were based on all of this public comment, and EPA has determined that it is unnecessary to postpone adoption of these definitions

until after further comment is solicited and evaluated. However, since a major industrial group has requested another opportunity to comment on these important issues, EPA is inviting further comment on these definitions, particularly to identify any considerations that were not relevant in developing the PSD regulations, and any additional considerations relevant to the application of these definitions to requirements for new preconstruction review programs under Section 173. Any comments must be submitted on or before February 15, 1979.

d. *Applicability to modifications accompanied by emission reductions within the same source (intrasource offsets).* Some commenters suggested that the Ruling should be amended to exempt a modification of an existing source which increases allowable emissions by 50 tons per year, 1000 pounds per day, or 100 pounds per hour, or more if there are accompanying reductions within the same source (intrasource offsets) such that the net increase from the source is less than the above amounts, or even that there is a net decrease. It was even suggested that this exemption apply to the addition of new facilities at an existing source. Where a state implementation plan is revised and implemented to satisfy the requirements of Part D, including the reasonable further progress requirement, the plan requirements for major modifications may exempt modifications of existing facilities that are accompanied by intrasource offsets so that there is no net increase in emissions. The Agency endorses such exemptions, which would provide greater flexibility to sources to effectively manage their air emissions at least cost. However, as long as the emission Offset Interpretative Ruling remains operational, the exemption will not be allowed for the reasons stated below. The text of the Ruling is rewritten to state in positive terms that the exemption is not permitted. Since the 1976 Ruling invited public comment on the requirements for modifications, and since this amendment clarifies the original language without changing the substance, EPA has determined that additional notice and public procedure before making the amendment are unnecessary.

If the Ruling were amended in the suggested manner, a source owner could construct or substantially modify a facility by obtaining only part of the offsets ordinarily required and avoiding the other conditions required for major pollution sources in nonattainment areas prior to there being an adequate Part D implementation plan. This would conflict with several of the basic purposes of the Ruling, which are to assure that sufficient offsets be obtained to represent reasonable progress toward attainment of the applicable standard, that the new facilities meet the lowest achievable emission rate (LAER), and that other sources owned by the applicant be in compliance with the approved SIP or on acceptable compliance schedules. The need to reduce new emissions through these requirements is particularly great before revised plans under Part D are adopted and implemented. Therefore, it is not enough that there be no net increase in emissions; there are additional independent requirements which must be met. There is no reason to depart from this principle simply because offsets happen to come from a facility within the same source. Since the facility will be new or substantially modified, it has an opportunity to employe [sic] LAER and satisfy the other requirements like any other source subject to the Ruling. This has been the consistent application of this Ruling.

Unlike this Ruling, EPA's recently published PSD regulations include an exemption for modifications of existing facilities which are accompanied by sufficient intrasource offsets that there would be no net increase in emissions (see discussion at 43 FR 26394, June 19, 1978). EPA believes that the need to reduce new emissions as much as possible is greater under this Ruling for an area where standards are violated than under the PSD requirements for a clean area where deterioration is the only concern.

Modifications of existing facilities accompanied by sufficient intrasource offsets so that there would be no net increase in emissions may, however, be exempted by the States from the new source review procedures under Part D that will supersede this Ruling. This exemption would not be applicable

where a major facility is added to or is reconstructed at a source, whether the addition is to replace production capacity or for growth. The above exemption is permitted under the SIP because, to be approved under Part D, plan revisions due by January 1979 must contain adopted measures assuring that reasonable further progress will be made. Furthermore, in most circumstances, the measures adopted by January 1979 must be sufficient to actually provide for attainment of the standards by the dates required under the Act, and in all circumstances measures adopted by 1982 must provide for attainment. See Section 172 of the Act and 43 FR 21673–21677 (May 19, 1978). Also, Congress intended under Section 173 of the Act that States would have some latitude to depart from the strict requirements of this Ruling when the State plan is revised and is being carried out in accordance with Part D. Under a Part D plan, therefore, there is less need to subject a modification of an existing facility to LAER and other stringent requirements if the modification is accompanied by sufficient intrasource offsets so that there is no net increase in emissions. Consequently, for a plan approved and implemented under Part D, it is acceptable for the State to include the above exemption for intrasource offsets in its new source construction under the State plan and Sections 110(a)(2)(I) and 173(4) must apply to major modifications regardless of intrasource offsets if the plan is found not to satisfy Part D or is not being implemented, because in those instances the plan cannot be relied upon to assure reasonable further progress and, eventually, attainment.

* * *

The Interpretative Ruling published by EPA on December 21, 1976, at 41 FR 55524, is revised and codified as a new Appendix S to 40 CFR Part 51. In the footnote to 40 CFR 51.18 "41 FR 55528, December 21, 1976," is deleted and "Appendix S" is inserted in its place. As revised Appendix S reads as follows:

APPENDIX S—EMISSION OFFSET INTERPRETATIVE RULING

I. INTRODUCTION

This appendix sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution (not including indirect sources) Under 40 CFR 51.18 and Section 129 of the Clean Air Act Amendments of 1977. Pub. L. 95–95. (note under 42 U.S.C. § 7502. A major new source or modification which would contribute to a violation of a national ambient air quality standard (NAAQS) may be allowed to construct only if the stringent conditions set forth below are met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.

For each area designated as exceeding an NAAQS (nonattainment area) under 40 CFR 81.300 *et seq.*, this Interpretative Ruling will be superseded after June 30, 1979—(a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of Part D, Title 1, of the Act; or (b) by a prohibition on construction under the applicable SIP and Section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of Part D. The Ruling will remain in effect to the extent not superseded under the Act. This prohibition on major new source construction does not apply to a source whose permit to construct was applied for during a period when the SIP was in compliance with Part D, or before the deadline for having a revised SIP in effect that satisfies Part D.

II. INITIAL SCREENING ANALYSES AND DETERMINATION OF APPLICABLE REQUIREMENTS

A. *Definitions.* For purposes of this Ruling:

1. "Source" means any structure, building, facility, equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties

and which is owned or operated by the same person (or by persons under common control).

2. "Facility" means an identifiable piece or process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

* * *

3. Proposed Rulemaking to Amend Definition of "Source" in EPA's PSD and Nonattainment Area Regulations to Conform to Court Decision (excerpted), 44 Fed. Reg. 51924 (September 5, 1979)

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Parts 51 and 52]

Requirements for Preparation, Adoption, and Submittal of SIP's; Approval and Promulgation of State Implementation Plans

AGENCY: Environmental Protection Agency.
ACTION: Proposed Rules.

SUMMARY: EPA proposes to amend its regulations for the prevention of significant deterioration 40 CFR 51.24, 52.21 (1978) in response to a court decision that overturned those regulations in major respects. EPA also proposes changes to its regulations affecting new source review in nonattainment areas, including restrictions on further major source growth and requirements under EPA's Emission Offset Interpretative Ruling, 40 CFR Part 51 App. S, and section 173 of the Act, to conform those rules to the court decision.
DATES: The deadline for submitting written comments is October 5, 1979.
ADDRESSES: *Comments.* Comments should be sent (in triplicate if possible) to Central Docket Section (A-130), Washington, D.C. Atten: Docket No. A–79–35.

Docket: In accordance with section 307(d), of the Clean Air Act, 42 U.S.C. 7607(d). EPA has established a docket for

this rulemaking. It bears Docket No. A–79–35. The docket is an organized and complete file of all significant information submitted to or otherwise considered by EPA during this rulemaking. The contents of the docket will serve as the record in the case of judicial review under section 307(b) of the Act, 42 U.S.C. 7607(b). The docket is available for public inspection and copying between 8 a.m. and 4 p.m., Monday through Friday, at EPA's Central Docket Section. Room 2903B. A reasonable fee may be charged for copying.

PUBLIC HEARINGS: EPA intends to hold public hearings on the proposals in this notice in September in San Francisco, California, and Washington, D.C. The exact times and places will be announced in due course.

FOR FURTHER INFORMATION CONTACT: Michael Trutna, Standards Implementation Branch (MD-15). Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711. 919/541-5292.

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I. Background

A. *Prevention of Significant Deterioration.* In 1974, EPA Promulgated regulations to prevent emissions of sulfur dioxide (SO_2) and particulate matter (PM) from significantly deteriorating air quality in areas where concentrations of those pollutants were lower than the applicable national ambient air quality standards (NAAQS). 39 FR 42510 (codified at 40 CFR 52.21 (1977)). EPA made those regulations part

of the State Implementation Plan (SIP). The prevention of significant deterioration (PSD) regulations prohibited the construction of any new source or modification in certain categories, unless EPA or a delegate state had issued a permit evidencing that the source or modification would apply "best available control technology" (BACT) for SO_2 and PM, and that emissions of those pollutants from the source or modification would not cause significant deterioration of air quality in any area.

On August 7, 1977, the President signed the Clean Air Act Amendments of 1977 (1977 Amendments) into law. Pub. L. No. 9595.91 Stat. 685. Those amendments established a new set of PSD requirements as Part C of Title I of the Clean Air Act (Act). *See* Sections 160–169, 42 U.S.C. 7470–79. The new requirements follow the outline of the old regulations, but are more elaborate and in many ways more stringent. The 1977 Amendments also directed that each SIP was to contain the new requirements. *See* Sections 161, 110(a)(2)(D) and (J). 42 U.S.C. 7471, 7410(a)(2)(D) and (J).

In response to that mandate, EPA promulgated two sets of PSD regulations on June 19, 1978. One set specified the minimum requirements that a PSD SIP revision would have to contain in order to warrant EPA approval. 43 FR 26380 (codified at 40 CFR 51.24 (1978)) (hereinafter, the "Part 51 regulations"). The other set comprehensively amended the old PSD regulations and incorporated into them the new PSD requirements. 43 FR 26388 (codified at 40 CFR 52.21 (1978) (hereinafter, the "Part 52 regulations")). EPA intended that, until it had approved a PSD SIP revision for a state, the permitting of new sources and modifications to be constructed in its clean areas would continue under the new Part 52 regulations. The United States Court of Appeals for the District of Columbia Circuit subsequently affirmed that approach. *Citizens To Save Spencer County v. EPA*, 12 ERC 1961 (March 27, 1979).

Many industrial and environmental groups petitioned the same court for review of the substantive provisions of both the part 51 and Part 52 regulations. On June 18, 1979, the

court issued a decision that upheld some of those provisions and overturned others. *Alabama Power Company v. Costle*, 13 ERC 1225. In its opinion the court merely summarized its rulings, but promised supplemental, comprehensive opinions in due course, probably by "the end of this summer." *Id.* at 1227 n.7. The court also invited the parties to file petitions for reconsideration, several of which were filed but have not yet been acted upon. In an order that accompanied the summary opinion, the court stayed the effect of its decision until it had issued the supplemental opinions. The purpose of this procedure, the court explained, was "to enable EPA to proceed as soon as possible to commence rulemaking or other proceedings necessary to promulgate those revisions in the PSD regulations required by (the court's) rulings, and to take other prudent action to effectuate congressional policies." *Id.* at 1227.

By this notice, EPA is beginning the process the court had in mind. It is here proposing various amendments to the PSD regulations. Some of those amendments would replace the provisions rejected by the court; others would add entirely new provisions to supplement the replacement provisions. Each of the proposals is discussed in detail in material which follows this background section.

B. *Requirements Relating to Nonattainment Areas.* The only regulations before the court in *Alabama Power* are EPA's PSD regulations. They are therefore the only regulations directly affected by the court's decision. However, several statutory definitions and other concepts addressed in *Alabama Power* are also relevant to the statutory requirements for areas where pollution exceeds the national ambient air quality standards (nonattainment areas). By this notice, EPA is proposing changes to its regulations for nonattainment areas, to conform the regulations to the decisions in *Alabama Power*.

There are three separate sets of nonattainment requirements affecting the review of new or modified major stationary sources, each applicable under a different set of circumstances. First, before July 1, 1979, EPA's Emission Offset Interpre-

tative Ruling (offset ruling) governed new construction that would cause or contribute to a violation of a standard. The offset ruling will still be effective in the future but only in a few, limited instances. The current, revised offset ruling was published by EPA on January 16, 1979. 44 FR 3274.

Second, after June 30, 1979, state plans which satisfy the requirements of Part D, Title I, of the Act (42 USC 7501 and following) are to be in effect for areas designated as nonattainment areas under section 107(d) of the act, 42 U.S.C. 7407 (d). EPA has published several notices about what constitutes an acceptable Part D plan revision. *See* 43 FR 21673 (May 19, 1978), 44 FR 8311 (February 9, 1979), 44 FR 20372 (April 4, 1979), 44 FR 25243 (April 30, 1979), 44 FR 38583 (July 2, 1979). In situations where a Part D plan was not due by July 1, 1979, the offset ruling continues to apply (*e.g.*, where a violation of an ambient standard is discovered in a designated attainment area, or where the deadline for a Part D plan for a secondary standard is postponed under section 110(b) of the Act, 42 U.S.C. 7410(b)).

Finally, for areas where Part D plans are due but where the plan either does not satisfy Part D or is not carried out in accordance with Part D, the Act in sections 110(a)(2)(I) and 173(4) provides for restrictions on major new source construction. 42 U.S.C. 7410(a)(2)(I) and 7503 (4). On July 2, 1979, EPA issued a ruling implementing this restriction, and invited comment on additional language to clarify how the statutory restriction will apply. 44 FR 38471, 38583, (July 2, 1979), 44 FR 42195, 42246 (July 19, 1979).

The key aspect of these nonattainment requirements that is affected by *Alabama Power* involves the definition of the new and modified stationary sources that are subject to stringent preconstruction permitting conditions. In the January 16, 1979 revision to the offset ruling, EPA adopted virtually the same definitions of "major source" and "major modification" as were adopted in the PSD regulations and were overturned in *Alabama Power*. EPA stated in the preamble to the offset ruling that those definitions were also applicable to state permitting programs required under Part

D. EPA also ruled that the definitions apply to the prohibition on construction under section 110(a)(2)(I) (except that the cut-offs to limit review of sources with low allowable emissions do not apply to section 110(a)(2)(I)). 44 FR at 3276 (col. 1).

Although the definitions were adopted as final action in the offset ruling, EPA invited additional comment.

The statutory language on which the "major source" and "major modification" definitions were based is very similar for the nonattainment programs as for PSD, and the reasoning in the June 18 *Alabama Power* decision generally appears to be applicable to both. The comments on the nonattainment definitions invited in the January 16 notice have therefore been rendered irrelevant by the court decision, and EPA is now proposing new definitions.

Those sections of this preamble which relate to the definitions of "major source" and "major modification" therefore discuss nonattainment requirements as well as the PSD regulations. Where the concepts and goals of nonattainment and PSD differ, we are proposing and seek comment on alternative approaches consistent with the distinctive goals of each. In addition, the discussion on "Geographic Applicability" addresses the nonattainment requirements. The court did not directly address the nonattainment requirements so EPA offers here two alternative approaches for comment.

Because of the importance of resolving these questions expeditiously, today's proposal does not have an accompanying economic impact evaluation. Such an evaluation will be performed and be made available for public comment prior to promulgation.

The discussion which follows first highlights the proposed PSD and nonattainment changes and then focuses in detail on each of them.

II. Highlights

A. *Proposed Regulations Affecting New Source Review in Both Nonattainment and PSD Areas:*

1. *Potential to Emit*: The regulations proposed today would

again make major construction projects subject to new source review (NSR) on the basis of increased potential to emit. Under the proposal the annual emission potential of a source would be determined after the application of air pollution controls rather than before as was generally done under the existing regulations. In calculating annual potential emissions of a source, maximum annual rated capacity, year-round hours of operation, and any enforceable permit conditions on the type of materials combusted or processed will be used.

2. *Fugitive Emissions*: Fugitive emissions, as proposed, means those emissions released directly into the atmosphere without passing through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions are proposed not to be considered when determining the annual emissions potential of a stationary source except when such emissions come from specified industry types.

3. *Source*: Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. "Building, structure, facility or installation" means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out. "Building, structure, or facility" means plant and "installation" means the individual emission unit within the plant for these nonattainment review situations. The manner in which source is defined places a vital role in determining when NSR would apply. When installation is defined differently than facility, more changes at major stationary sources would be subject as major modifications (see below).

4. *Major Modification*: The proposal would subject changes in the design or operation of a major stationary source to NSR only if (1) a significant net increase in the potential emissions of a pollutant for which the source is major would occur, or (2) cumulative net increases in the potential emissions of a pollutant regulated under the Act occur at the same source after the applicable NSR time of concern that in total would exceed the applicable 100/250-ton threshold. The proposal, unlike the existing regulations, would allow certain

emission reductions occurring at the same source to offset any increases due to proposed construction and avoid review. If a source has the potential to emit more than it is legally allowed to emit, no offset credit could be taken by a source for reducing its potential emissions down to the allowed level.

5. *No Tiered Review*: Under the existing regulations, only those sources and modifications which have large uncontrolled emission potential and also increased allowable emissions equal to or greater than 50 tons per year would receive a detailed review. All major sources and major modifications are now fully covered as discussed elsewhere.

6. *Preconstruction Notice*: Under the proposed regulations, an owner or operator of certain sources would be required to give written preconstruction notice to the applicable reviewing authority in lieu of getting a permit. This requirement would apply to (1) construction not qualifying as major modifications due to sufficient offsetting emission reductions, (2) emission reductions to be used for future offset credit in (1), and (3) construction not qualifying as major stationary sources due to application of air pollution controls not generally required by the SIP or 40 CFR Parts 60 and 61. The notice would contain a schedule of the applicable emissions changes and a demonstration that the proposed reductions are or would be sufficient and enforceable.

B. *Proposed Changes Specific to Nonattainment Requirements.*

1. *Major Modification*: The same basic definitional structure for "major stationary source" and "major modification" is being proposed for both nonattainment requirements and PSD requirements. The principal difference is the extent to which emission decreases may be used to offset increases at the same major stationary source to determine whether the source is "modified" and needs a permit.

a. *Emissions Baseline for Modification*: The proposed regulations would generally subject a change at a major source to review only if a significant net increase in the potential to emit a nonattainment pollutant for which the source is major. An exception is that no credit may be taken

for reducing those potential emissions which are greater than allowable emissions. In nonattainment areas where the offset ruling or Part D NSR would apply, the applicable SIP would generally define the allowable emissions baseline for reduction credit.

b. *"Bubble" Exemption*: The use of offsets inside the same source is called the "bubble." EPA proposes use of the definition of "source" (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of "installation" as an identifiable piece of process equipment. New or modified major-source installations would require NSR permits regardless of any offsetting emission reductions elsewhere in the facility. A change or a series of changes that do not result in a significant net increase in the installation's potential to emit and do not constitute a reconstruction of the installation, will not be subject to NSR permitting requirements.

iii. The offset ruling is proposed to also include a definition of "installation" with the effect described in paragraph ii.

iv. The restriction on construction for inadequate Part D SIPs (or failure to carry out the same) under section 110(a)(2)(1) is proposed to include a definition of "installation." However, unlike the situation described in paragraph ii, no bubble will apply, and any significant increase in the nonattainment pollutant for which the source is major would be subject.

2. *Regulatory Transition*: EPA intends to promulgate regulations within 90 days after issuance of the final *Alabama Power* opinion by the U.S. Court of Appeals. Such changes would generally apply to any future permitting situations after promulgation, but sources compelled to meet more restrictive requirements under the old regulations may apply

to the applicable permitting authority to reevaluate such requirements. A change in a permit which would make the SIP no longer adequate to demonstrate attainment would require an accompanying SIP revision to ensure attainment would not be jeopardized.

The proposed changes also affect how state adopted NSR programs may be approved for designated nonattainment areas. EPA generally proposes to approve any state plan that would meet the existing SIP approval criteria or the criteria proposed today. Restrictions on growth would be implemented using the existing definitions affecting source applicability until today's regulations are promulgated.

3. *Geographic Applicability*: The proposed regulations would apply the applicable nonattainment NSR requirements throughout the area designated as nonattainment. The existing regulations now allow a source within a designated nonattainment area to demonstrate that it would construct in a clean portion and affect significantly no dirty portion of the nonattainment area. Growth prohibitions, Part D, or the offset ruling would also apply when a proposed major source or major modification in a clean area would significantly impact a nonattainment area.

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VIII. Source/Facility Installation

A. *Definition of "Source"*. In its existing PSD regulations and the offset ruling, EPA has defined "stationary source" as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." EPA also defined "facility" as an "identifiable piece of process equipment." 40 CFR 51.24(b)(4), (5), 52.21 (b)(4),(5); 40 CFR Part 51, Appendix s, sections II.A.1 and 2, as amended 44 FR 3282.

In *Alabama Power* the court said that the definition of "stationary source" in section 111(a)(3) governs PSD review. Slip op. at 11. Section 111(a)(3) defines "stationary source"

as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411 (a)(3). The court stated that EPA may not add items to this list. Slip op. at 11. In conformance with the court's opinion EPA is proposing to delete the terms "equipment," "operation" and "combination thereof" from the definition of stationary source in both the PSD and nonattainment regulations. The court also found that EPA exceeded its statutory authority in the way in which it tried to apply preconstruction review to both a *single* building, structure, facility or installation, which is permitted by section 111(a)(3), and a *combination* of such units. Slip op. at 12. EPA therefore proposes to delete the term "combination thereof" from the definition of stationary source.

The court did, however, state that EPA has substantial discretion to define the terms in the definition of source—that is, building, structure, facility, or installation—to include a wide range of pollution-emitting sources. Slip op. at 11. The components of "source" could be defined differently for PSD purposes than for the purposes of other provisions of the Act. Slip op. at 12, note 13. The key constraint on EPA's discretion is that "the definitions, applicable to each set of provisions must be reasonably appropriate for the purposes of those sections." *Id.* The same court has earlier stated that, in defining the components of source, "EPA is guided by a reasoned application of the terms of the statute it is charged to enforce, not by an abstract 'dictionary' definition." *ASARCO, Inc.* v. *EPA*, 578 F.2d 319, 324 note 17 (D.C. Cir. 1978). These two court opinions instruct the Agency to analyze the statutory purposes of the various PSD and nonattainment NSR provisions and define the terms "building," "structure," "facility," and "installation" to carry out best the statutory intent of the provisions.

B. *Sources Subject to PSD Requirements.* One of the fundamental purposes of PSD is to maintain air quality better than the ambient standards. This purpose can best be served if NSR applies to the largest industrial grouping that, as a practical matter, industry and the reviewing authorities can

reasonably deal with as a single unit. EPA believes the appropriate grouping is all emitting activities on contiguous or adjacent property and under common control—typically an industrial plant.

For PSD, EPA believes that a large industrial grouping is the appropriate unit for review of both construction of new plants and new and modified pieces of process equipment at existing plants. Applying PSD review to large groupings rather than separate pieces of process equipment ensures adequate review of new plants. EPA believes that unit-by-unit review, without plant-wide review, would fail to protect air quality standards and increments. Large new plants could be constructed at one site as a collection of individual process units, each below the potential-to-emit threshold, and thereby escape review altogether. If clustering of new growth were permitted without preconstruction review, increments and even standards could easily be violated.

While increased protection of air quality might be achieved by reviewing groupings even bigger than a plant, review of larger groupings is infeasible. New units not on adjacent property or under common control would be an awkward grouping to evaluate and regulate. Therefore, PSD review will apply to groupings of new construction no larger than a plant.

Plant-wide review also serves the basic purposes of PSD when pieces of equipment are being built or modified at existing plants. With plant-wide review, industry can construct new and modified equipment without a permit, by reducing emissions enough that net emissions at the plant do not increase. (Allowing use of offsetting emission reductions within the source to avoid NSR is called the "bubble" approach. For discussion of the bubble, see "Modification"). The purposes of PSD are served, because assuring that there will be no net increase in emissions from the plant also assures that the construction will not interfere with maintaining good air quality.

Permitting offsets only within individual process units would go beyond maintaining the status quo. While additional

emission reductions beyond existing levels are needed to attain standards in nonattainment areas (see discussion in the next section), such reductions are ordinarily unnecessary to meet the purposes of the PSD program. In addition, the review itself would not make sense relative to RSD goals, if new units at sources with offsetting plant-wide decreases were forced to undergo review. Sources might be required to model and monitor increment consumption when air quality is expected to improve or stay the same. In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity.

Since obtaining offsets is often less expensive and less time-consuming than obtaining a PSD permit, providing industry with the offset option will facilitate upgrading of production capacity, and encourage application of improved controls to obtain offsets. Permitting plant-wide use of offsets provides the greatest opportunity for both of these desirable results. Thus, plant-wide review is the preferred approach under PSD for reviewing construction of both new plants, and new and modified pieces of equipment at existing plants.

For these reasons, EPA proposes that PSD review apply to a large grouping of pollutant-emitting activities, like an industrial plant. To accomplish this, EPA proposes to define "building, structure, facility, or installation" to mean a grouping of activities on contiguous or adjacent properties and under common control. The term "grouping" is intended to include a plant consisting of a single isolated activity, as well as a plant consisting of many activities.

C. *Sources Subject to Nonattainment Requirements.*

1. *Purpose to be Served by Nonattainment NSR Definitions.* Unlike the PSD provisions, the nonattainment provisions are primarily intended not merely to prevent excessive increases in emissions, but to reduce emissions. This fundamental difference in purpose requires a different approach to defining the sources that will be subject to NSR. To assure adequate review, EPA believes that both entire plants and individual pieces of equipment must be subject to NSR. The one

exception under EPA's proposal is for areas subject to fully complete SIPs satisfying Part D requirements. In these areas, where attainment is assured, NSR need apply only to entire plants.

To assure adequate review of new plants, a large grouping must be subject to nonattainment NSR for the reasons discussed above for PSD. To do otherwise would allow a new plant that is divided into separate process units, each below the potential emission threshold, to escape review. New emissions could thus be added to the existing violation, without review, making attainment virtually impossible. Therefore, EPA believes that nonattainment programs, like PSD programs, must apply NSR to entire plants.

EPA believes that pieces of process equipment within plants should also be subject to *NSR* under nonattainment programs. This would prevent use of plant-wide offsets for increases from construction or modification of major pieces of process equipment. The plant-wide bubble is less appropriate for nonattainment programs than for PSD programs, because it only holds emissions constant. Nonattainment programs, in contrast to PSD programs, must positively reduce emissions.

If increases from construction of new or modified pieces of process equipment could be offset on a plant-wide basis the construction would make attainment of the standards substantially more difficult. For each nonattainment area, there are only a limited number of cost-effective ways to reduce existing emissions enough to attain standards. If the cost-effective opportunities to reduce emissions are used to offset equally large increases from new construction, then other, less cost-effective ways to reduce emissions must be found to achieve attainment.

Therefore, to ensure that construction within existing plants does not make attainment of the standards more difficult, nonattainment programs must provide for NSR new and modified pieces of equipment. The NSR requirements will assure that the most stringent controls are applied to new and modified equipment, and that more than offsetting

reductions in existing emissions are obtained to assure adequate continued progress toward attainment. The nonattainment requirements also ensure that other sources in the state, owned or operated by the same owner, are in compliance with SIP requirements needed for attainment.

This policy argument is strongly supported by the legislative history. Even where demolition of obsolete equipment reduces emissions, Congress indicated that construction of replacement equipment should be subject to NSR under nonattainment programs without regard to the offsetting reductions:

> Thus, [under the offset ruling and Part D NSR requirements,] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.[4] (Statement of Senator Muskie, 123 Cong. Rec. at S 13702 col. 2 [daily edition, August 4, 1977]).

2. *Proposed Definitions.* To implement this specific expression of Congressional intent, as well as the general purposes of the nonattainment provisions discussed above, EPA is proposing to define "source" to include not only plant-wide groupings of activities, but also individual pieces of process equipment. "Building, structure or facility"[5] would be defined as a large grouping of activities (a plant) and "installation" would be defined as an "individual piece of process equipment."

These definitions would prevent use of plant-wide bubble for all new and modified major pieces of process equipment. ("Major" means having high enough potential emissions to be a major stationary source. "Minor" means having less than that.) The plant-wide bubble would still serve to avoid NSR, when emissions from a new or modified *minor* piece of equipment (or from some activity like a coal pile that is not

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[4] Then, as now, "facility" was defined in EPA's offset ruling as a piece of process equipment.

[5] Referred to hereafter as "facility."

an installation) are offset by enough reductions at the plant so that there is no net increase in emissions at the plant. Furthermore, in accordance with the Congressional intent noted above, a replacement of an older piece of equipment would be treated as a new installation, regardless of any reductions from previous emission levels. A "reconstruction" would be treated in the same way as a replacement, when the capital cost of the new improvements exceeds 50% of a comparable replacement.

The proposed definitions tend to limit applications of the bubble, by defining certain large kinds of sources and certain small kinds of sources, and recognizing that some small sources are included within the boundaries of large sources. This approach is consistent with both the language of the Act and the interpretation in *Alabama Power*.

Congress, in defining "source" as any "structure, building, facility, or installation" must have contemplated that some of these components could be defined to be smaller than others and that the small components could be found within the large components. Defining some sources as small enough to be within the boundaries of larger-defined sources is also consistent with the court's instruction not to define source as a "combination" of facilities, installations, or other single source units. The proposed regulations define "facility" not as a combination of narrowly-defined sources, but rather as an independently-defined enitity. [sic] This single entity is composed of a grouping of emitting activities (which individually may or may not be sources)[6] meeting requirements of common control and adjacency. This plant definition is exactly

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[6] For example, a coal pile is not a piece of process equipment, and is, therefore, not an "installation" under the proposed definitions. However, it is an emitting activity, and can therefore be part or a "facility" under the proposed definitions. The Agency recognizes that the emissions from the coal pile would be fugitive emissions and subject to regulation as discussed in the section on "Fugitive Emissions."

the sort of "common sense industrial grouping" that the court said is a proper subject for NSR. Slip op. at 12.

The court stated that the same definitions of facility, building, structure, and installation, must govern the determination of not only whether there is a new major stationary source subject to NSR, but also whether there is a *modified* major stationary source subject to NSR. Slip op. at 21. EPA's definitions adhere strictly to this principle. Major facilities and major installations constitute both the new sources and the modified sources subject to NSR. Under these definitions, construction that is neither a new nor a modified major facility may be a new or modified installation, and vice versa. Congress, in defining "source" to include several items in the alternative, provided for such a result where necessary to achieve the purposes of the Act.

The following illustrates how the nonattainment NSR definitions would work. Suppose a firm proposed to construct three pieces of process equipment on a single plant site. Each piece of equipment would be an "installation," and the entire plant would be a "facility." Each installation would be a "source" and the entire facility would be a "source." If the installations would have annual potential emissions of 40, 190, and 150 tons per year, respectively, the facility would have potential emissions of 380 tons per year:

Installation (A)—40 tons per year (minor source).
Installation (B)—190 tons per year (major source).
Installation (C)—150 tons per year (major source).
Facility (A)—380 tons per year (major source).

Permits would be needed for the three major sources: Installation (B), Installation (C), and Facility (A). Since the permit for Facility (A) would, as a practical matter, cover all three installations, only a single permit application would be needed.

Suppose next that the firm proposed to modify Installation (C) to increase emissions by 70 tons, and decrease contemporaneously the emissions of Installation (B) by the same amount. There would be no modification of Facility (A), whose

total emissions would remain the same, but there would be a modification of Installation (C), whose emissions would increase by 70 tons. A permit would be needed for the modification of Installation (C).

If installation (B) were then modified to increase its emissions by 50 tons, but there were contemporaneous reductions of the same amount at the same Installation (B), no net increase in emissions would occur at either Installation (B) or at Facility (A) (technically, there would be no "modification"), and no permit would be needed. If there were a 20-ton increase at Installation (A) and a contemporaneous 25-ton decrease at Installation (C), there would be a modification of minor Installation (A), whose net emissions increased, but no modification of major Facility (A), whose net emissions decreased, and no permit would be needed.

3. *Nonattainment Programs to Which the Proposed Definitions Apply.* The definitions described above are to apply to sources subject to the offset ruling and to restrictions on construction under sections 110(a)(2)(1) and 173(4) of the Act. EPA also proposes that these definitions apply to "incomplete" state plans under Part D of the Act. Incomplete plans are those that do not yet show reasonable further progress and attainment of the ambient standards, based exclusively on currently adopted, approved, and enforceable requirements. Incomplete plans therefore include any plan where approval under part D is conditioned on submission of additional material by the state, any plans containing state-adopted schedules for submission of additional material,[7] and any plans where additional submissions are needed by July 1, 1982, as required by section 129(c) of the 1977 Amendments (note under 42 U.S.C. 7502). Since incomplete plans do not yet include all requirements needed for attainment, EPA believes that the definitions described above, including the definition of "installation," are needed for the reasons discussed above.

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[7] For a discussion of conditional approvals and schedules, see 44 FR 20372 (April 4, 1979) and 44 FR 38583 (July 2, 1979).

However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. *See* 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment. Protection of attainment under the SIP is also assured by not permitting offset credit for emission reductions required by the approved SIP (see "Modification").

However, for sources subject to restrictions on construction in sections 110(a)(2)(I) and 173(4), EPA believes that no offsets should be permitted.[8] EPA proposes to accomplish this through the definition of "major modification," rather than the definition of the components of "source." This is discussed in the section on "Modification."

EPA is considering one other approach for nonattainment areas. Under this approach, all components of "source" would be defined as pieces of process equipment, and none would be defined as plants. NSR would apply to new pieces of equipment, regardless of offsets elsewhere in the plant. For modifications of existing pieces of equipment, offsetting reductions within the same piece of equipment could be considered in determining whether there is a significant net increase in emissions. However, under this alternative approach, new

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[8] Reconstructed major installations, regardless of whether they are considered "modifications" even under the restrictive definition of major modification, are new major sources subject to the restrictions on construction.

or modified minor installations would never be subject to review, regardless of whether they are part of a major plant.

Since numerous individual pieces of process equipment typically have less than 100 tons per year potential, and would escape preconstruction review even though they are part of a single plant with other 100 tons potential emissions, this approach would allow much new construction to take place without preconstruction review. This problem could be counteracted somewhat, by requiring that state plans provide for close tracking of new minor source construction. However, as discussed above, EPA believes that failing to review entire new plants would create enough risk of massive new emissions that this approach is undesirable.

D. *Summary.* In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

In addition, for the restrictions on construction, EPA is proposing to define "major modification" so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR regardless of whether they are within a major plant.

EPA invites comment generally on what approach should be used for each type of program.

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4. Final Rule Amending Definition of "Source" in EPA's PSD and Nonattainment Area Regulations (excerpted), 45 Fed. Reg. 52676 (August 7, 1980)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, and 124

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.
ACTION: Final rules.

Begins at 45 Fed. Reg. 52676

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IX. Source

A. Proposed Definitions of "Source"

In the 1978 PSD regulations, EPA defined "source" as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." The Offset Ruling contained the same definition of "source."

In its June 1979 opinion in *Alabama Power*, the Court of Appeals rejected the definition of "source" in the PSD regulations. It concluded that Congress intended section 111(a)(3) of the Act to govern the definition of "source" for PSD purposes. That section defines "source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." In defining "source," EPA used the terms "building," "structure," "facility," and "installation," but then added "equipment," "operation," and "combination thereof." The court held that EPA, in adding those terms, exceeded its authority. It stated, however, that the Agency has sub-

stantial discretion to define one or more of the four terms in section 111(a)(3) to include a wide range of pollutant-emitting activities.

In its June opinion, the court also focused on the clause "which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or persons under common control)." The court held that the approach, which that clause embodied, of grouping pollutant-emitting activities solely on the basis of proximity and control is generally acceptable, since the Agency had "evidenced an intention to refrain from unreasonable literal applications of the definition and instead to consider as a single source only common sense industrial groupings." 13 ERC at 1230.

In September 1979, EPA proposed to define "building, structure, facility and installation" for PSD purposes as "any grouping of pollutant-emitting activities which are located on one or more contiguous or adjacent properties and which are owned or operated by the same person (or by persons under common control)." As the preamble to the September proposal explains in detail, EPA concluded that the proposed definition would serve the purposes of PSD adquately [sic] by requiring review of those major projects that would cause air quality deterioration. At the same time, the definition would operate to avoid review of projects that would not increase deterioration significantly. In EPA's view, the dominant purpose of PSD review is to maintain air quality within the applicable increments.

In September, EPA proposed to define the four component terms differently for nonattainment purposes. Specifically, the Agency proposed to define "building, structure and facility" as it had proposed to define them for PSD purposes, and "installation" as "an identifiable piece of process equipment." One effect of that proposal would be the application of nonattainment requirements to a new piece of equipment that would emit significant amounts of a pollutant for which the area had been designated nonattainment, regardless of any accompanying emissions offsets at the plant. The pream-

ble to the proposal explained: "Unlike the PSD provision, the nonattainment provisions are primarily intended not merely to prevent excessive increases in emissions, but to reduce emissions. This fundamental difference in purpose requires a different approach to defining the sources that will be subject to NSR." 44 FR 51932. EPA proposed to apply this definition to "incomplete" SIPs, i.e., those which did not demonstrate attainment based exclusively on currently approved requirements. Fully "complete" SIPs could, under EPA's proposal, use the PSD definition.

In December 1979, the court issued its final opinion on the 1978 PSD regulations, which opinion superseded the June 1979 opinion. In the December opinion, the court reaffirmed its earlier conclusions that EPA must adhere to section 111(a)(3) in defining "source" for PSD purposes and that EPA has discretion to define the component terms "reasonably to carry out" the purposes of PSD. 13 ERC at 2039. The court added that "a plant is to be viewed as a source" and that the Agency "should" provide for the aggregation of polluting-emitting activities "according to considerations such as proximity and ownership." *Id.* at 2039 and 2040. But it warned that "EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms." Finally, the court said that any new definitions "should also provide explicit notice as to whether (and on what statutory authority) EPA construes the term source, as divided into its constituent units, to include the unloading of vessels at marine terminals and 'long-line' operations such as pipelines, railroads, and transmission lines. We agreed with Industry Groups that EPA has not yet given adequate notice as to whether it considers those industrial activities to be subject to PSD." *Id.* at 2040.

In January 1980, EPA solicited comment on the September proposals in light of the December opinion of the court. 45 FR 6803. EPA specifically asked for comment on whether factors other than proximity and control, such as the functional relationship of one activity to another, should be used. The Agency also asked for specific examples of cases where a

literal application of the proposed definition would be unreasonable.

B. PSD: Comments on Proposal and Responses

Most commenters agreed that for PSD purposes EPA should adopt definitions of "building," "structure," "facility," and "installation" that would aggregate pollutant-emitting activities, instead of definitions that would restrict one or more of those terms to an individual activity. One commenter, however, argued that EPA should adopt for PSD purposes the same definitions of those terms that it had proposed to adopt for nonattainment purposes. The commenter asserted that the decision of the court in *ASARCO* v. *EPA*, 578 F. 2d 319 (D.C. Cir. 1978), required the Agency to impose BACT on a new unit at a plant, even if the unit would result in no net increase in emissions. The commenter also asserted that the "all-encompassing definition * * * destroys the intent of the PSD program by letting opportunities for *reducing* increment consumption disappear before control technology standards (*i.e.*, NSPS) can be in place." (Emphasis added.)

EPA has decided to adopt for PSD purposes the sort of "all-encompassing" definitions that the commenter opposed. First, in its December 1979 opinion in *Alabama Power*, the court explicitly held that *ASARCO* "does not prevent aggregation of individual units of a plant into a single source." 13 ERC at 2040. Second, the dominant purpose of PSD review is not to reduce increment consumption, but rather to maintain air quality deterioration below an applicable increment. A definitional structure that aggregates pollutant-emitting activities into one "source" would serve that purpose, since it would allow only those changes at the "source" that would not significantly worsen air quality to escape review.

Some of the commenters who agreed that each of the component terms of "source" should aggregate pollutant-emitting activities also supported the use of proximity and control as the sole criteria for aggregating them. Most of those commenters, however, objected to the use of proximity

and control as the sole criteria, some on the ground that the proposed definitions would be too inclusive and others on the ground that the definitions would not be inclusive enough.

The commenters who thought the definitions would be too inclusive asserted that they would group sets of activities at one site and under common control that are functionally or operationally distinct. Typical of the examples they gave are the following activities at one site and under common control: (1) a surface coal mine and coal-burning electrical generators that the mine supplies with coal; (2) a rock quarry and the portland cement plant that the quarry supplies with raw material; (3) a primary aluminum ore reduction plant, an aluminum fabrication plant and an aluminum reclamation plant; (4) a refinery, a service station, a research laboratory, a fertilizer factory, and a pesticide factory; and (5) a uranium mill and an oil field. With the language of the June 1979 opinion in mind, the commenters contended generally that to group the nominally different activities in each of those examples would violate any common sense notion of "plant."

The commenters who thought the proposed definitions would be too inclusive suggested a wide range of alternative definitions. For example, one group proposed that activities at one site and under common control should be combined only if: (1) they share the first three digits under the Standard Industrial Classification Code of the U.S. Department of Commerce, (2) they are dependent upon or affect the process of each other, (3) they use a common raw product or produce a common product, and (4) the proponent of the project in question does not show that the activities have entirely separate air quality impacts.

The commenters who thought the proposed definitions would not be inclusive enough urged the Agency to abandon control as a factor and adopt function in its place. Some of them described a plan by a group of independent companies to construct jointly a single coal-burning power plant to replace oil-burning power plants at various manufacturing sites belonging to those companies near to the site of the coal-burning plant. The commenters contended that EPA

should treat the old plants and the new plant as being within one "source," so that the new plant might escape PSD review. They argued that the new plant would not deteriorate air quality, since presumably the decrease in emissions from the shutdown of the old plants would offset the increase from the new plant, and that to allow it to escape review would facilitate the national switch from oil to coal.

After considering the comments of those who objected to the use of proximity and control only, EPA has decided to adopt for PSD purposes a definition of "building, structure, facility, and installation" that is different from the one it proposed in September. The final definition provides that those component terms each denote "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same 'Major Group' (*i.e.*, which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively)."

In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

The comments on the proposed definition of "source" have persuaded EPA that the definition would fail to approximate a common sense notion of "plant," since in a significant number of cases it would group activities that ordinarily would be considered as separate. For instance, a uranium mill and an oil field would ordinarily be regarded as separate entities, yet the proposed definition would treat them as one.

In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities on the basis of their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.

EPA has chosen the classification code in the *Standard Industrial Classification Manual, 1972*, as amended in 1977 ("*SIC*"), because it is both widely-known and widely-used. EPA has also chosen to use just one set of categories in the manual, those that describe each "Major Group" in the classification system and that bear a two-digit classification number, although the commenter who suggested that EPA use such a code also suggested that the Agency use the categories at the three-digit level. On the one hand, the two-digit categories are narrow enough to separate sets of activities into common sense groupings. In fact, most of the nominally different sets of activities in the examples given above would fall into a different two-digit category; only the fertilizer factory and the pesticides factory would fall into the same category. On the other hand, the categories are broad enough to minimize the likelihood of artificially dividing a set of activities that does constitute a "plant" into more than one group and the likelihood of disputes over whether a set of activities falls entirely into one category or another.

Each source is to be classified according to its primary

activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support. For example, a boiler might be used to generate process steam for both a commonly controlled and located kraft pulp mill and plywood manufacturing plant. If the yearly boiler output is used primarily by the pulp mill, then the total emissions of the boiler should be attributed to the mill.

In adopting the new definition of "source," EPA rejected the requests of those commenters who thought that the proposed definition would not be inclusive enough. As noted above, they urged that EPA formulate a definition that looked only to proximity and *function*. But such a definition by looking to function would unnecessarily increase uncertainty and drain the Agency's resources. In addition, such a definition would present groupings, such as the example the commenters gave, that would severely strain the boundaries of even the most elastic of the four terms, "building," "structure," "facility," and "installation."

Many commenters urged EPA to clarify the extent to which the final definition of those terms encompasses the activities along a "long-line" operation, such as a pipeline or electrical power line. For example, some urged EPA to add to the definition the provision that the properties for such operations are neither contiguous nor adjacent. To add such a provision is unnecessary. EPA has stated in the past and now confirms that it does not intend "source" to encompass activities that would be many miles apart along a long-line operation. For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one "source."

EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The

Agency can answer that question only through case-by-case determinations. One commenter asked, however, whether EPA would treat a surface coal mine and an electrical generator separated by 20 miles and linked by a railroad as one "source," if the mine, the generator, and the railroad were all under common control. EPA confirms that it would not. First, the mine and the generator would be too far apart. Second, each would fall into a different two-digit *SIC* category.

Three commenters focused on whether and to what extent the emissions from each ship that would dock at a proposed marine terminal should be taken into account in determining whether the terminal would be "major" for PSD purposes. One commenter argued in effect that the emissions of each such ship that are quantifiable and occur while the ship is coming to, staying at or going from the terminal should be taken into account. In the view of that commenter, all of those activities would be "integral" to the operation of the terminal. Another commenter asserted that none of the emissions of any such ship should be taken into account, because ships are mobile sources. The remaining commenter contended that only the emissions that: (1) come from a ship which is under the proprietary control of the owner or operator of the terminal and (2) occur while the ship is at the dock should be included in an applicability determination. That commenter viewed the ability of the terminal owner or operator to regulate the behavior of a ship as the critical consideration.

The permit requirements of the final Part 52 PSD regulations apply to a collection of pollutant-emitting activities according to the "potential to emit" of just those activities in that collection which constitute a "stationary source." Whether and to what extent the emissions of ships that would dock at a terminal are to be taken into account in determining PSD applicability depends, therefore, on whether and to what extent the term "stationary source" in the final regulations encompasses not only the activities of the terminal itself, but also the activities of the ships while they are coming to, staying at, or going from the terminal.

The final definition of "building, structure, facility, and installation" resolves that question. EPA intends the term "stationary source" under that definition to encompass the activities of a marine terminal and only those dockside activities that would serve the purposes of the terminal directly and would be under the control of its owner or operator. The term "dockside activities" means those activities in which the ships would engage while docked at the terminal. While "stationary source" encompasses combinations of activities, it is limited to combinations that would be "stationary," that is, fixed to the particular site. The activities of a terminal itself would be stationary, but all ship activities would not be. Only those that would directly serve the purposes of the terminal, such as loading and unloading, would be stationary since they alone would be in a sense fixed to the particular site. Hence, "stationary source" encompasses the activities of a marine terminal and only those dockside activities that would directly serve its purposes.

In addition, while "stationary source" encompasses combinations of stationary activities, it is further limited to those that would locate on "contiguous or adjacent properties." In EPA's view, only dockside activities would be located on "property" that is contiguous or adjacent to the terminal. Next, "stationary source" is also limited to those combinations of activities that would be "under the control" of one person or one group of persons who are themselves under common control. Hence, "stationary source" encompasses only the activities at a terminal and those dockside activities over which the owner or operator of the terminal would have control. Finally, the activities at a terminal and any such dockside activities fall under a single two-digit *SIC* category, namely "Water Transportation" (number 44).

Whether a particular dockside activity would directly serve the purposes of a terminal and would be under the control of its owner or operator depends upon the circumstances of a specific situation. Presumably, however, the activity of loading or unloading a ship would in every case directly serve the purposes of the terminal and would be under the control

of its owner or operator to a substantial extent. In particular, the Agency would expect that no loading or unloading could occur without the consent of the owner or operator and consequently that the owner or operator would set, or at least have a significant say in the setting of, the schedule for loading or unloading.

In adopting this interpretation of "stationary source," EPA in large measure has rejected the arguments of the commenters on the ship emissions issue. First, to treat *all* of the activities of a ship while it is coming to, staying at, and going from a terminal would violate any common sense notion of "building," "structure," "facility," or "installation." To group just those activities occurring at the terminal that are essential to its functioning entirely comports with common sense. Second, an activity such as loading and unloading is certainly stationary, even if the ships that engage in it have mobility. Ships, moreover, are not "mobile sources" within the meaning of section 110(a)(5) of the Act, the provision restricting indirect source review. Finally, the fact that a terminal owner or operator does not own a particular ship does not mean that the owner or operator has no control over behavior of the ship at the terminal.

In deference to the position taken in *Alabama Power*, EPA has decided to treat the definition of "source" in the 1978 PSD regulations as *not* encompassing any ship or ship activity. As a result, ship emissions are not to be taken into account at all in determining whether a marine terminal is subject to review under the 1978 PSD regulations. A terminal which would not be subject to review under the 1978 regulations if ship emissions are not included in the determination of potential to emit can also be excluded from review under the new regulations provided certain conditions are met. These conditions are that the owner or operator of such a source has obtained each of the permits required under the SIP for the terminal before the date this notice appears in the Federal Register and commences construction on it within 18 months after that date.

The final definition of the component terms of "stationary

source" differs from the proposed definition in one significant respect. The proposed definition used the phrase "*any grouping of* pollutant-emitting activities." The final definition uses the phrase "*all of the* pollutant-emitting activities." Taken literally, the proposed definition would have referred not only to all of the activities at a plant, but also to any subgroup of those activities. EPA, however, intended it to refer only to all of the activities. The final definition merely makes that explicit.

C. Nonattainment: Comments on Proposal and Response

Many commenters objected to EPA's proposed definition of "source" for nonattainment areas. Several commenters argued that there was no statutory basis for the distinction drawn in the proposal between "complete" and "incomplete" SIPs. Most of the commenters further claimed that the "dual definition" (*i.e.*, treating a source as both a plant and an individual piece of process equipment at the plant) both was illegal under the statute and *Alabama Power* and was wrong as a matter of policy.

The legal arguments presented by the commenters fell into two broad categories. First, they argued that the dual definition really defined "source" as a combination of sources, which had been forbidden by both *Alabama Power* and *ASARCO*. EPA therefore could, in these commenters' view, define "source" as either the entire plant or an individual piece of process equipment, but not both. These commenters opted for the former approach.

The second legal argument challenged EPA's contention that use of the plant-wide definition would be improper in nonattainment areas, because the purpose of the nonattainment new source review program is to reduce emissions, not to hold emissions constant. The commenters claimed that the Act gives primary responsibility for assuring reasonable further progress to the states, and the states therefore can choose whatever mix of strategies they want to achieve reasonable further progress. This suggested to the commen-

ters that EPA had no authority to ban a plant-wide definition for new source review if the state could otherwise demonstrate reasonable further progress.

Several commenters also pointed to a variety of policy concerns which they felt militated against EPA's proposed dual definition. First, they argued that the definition would discourage technological innovation that could actually reduce emissions, because sources would be reluctant to modernize for fear that such requirements as LAER would be applied to them. In particular, they felt sources would be unwilling to retire old inefficient facilities and replace them with efficient cleaner ones. Second, some commenters claimed that there was no point to reviewing a facility where offsetting emissions could be obtained, since on the whole ambient air quality would not get any worse. Finally, many commenters complained that the definitional structure as a whole was far too complex, and they urged that EPA simplify the system both by eliminating the distinction between "complete" and "incomplete" SIPs and by adopting one definition for both PSD and nonattainment areas. Most commenters preferred the PSD definition, although some urged that the dual definition be used.

In revising the Offset Ruling in January 1979, EPA adopted definitions of "source" and "modification" which had the effect of requiring any increase greater than 100 tons in the potential to emit of a plant to undergo nonattainment new source review, even if offsetting reductions at the plant were to accompany the change. The effect of the proposed definitions of "source" and "modification" which are being promulgated today would be basically the same as those in the Offset Ruling. Adoption of the proposed definitions would constitute, therefore, a continuation of an established approach to nonattainment new source review.

The comments on the dual definition have failed to persuade EPA that it should abandon the established approach at this time. As a result, the agency has decided to adopt the dual definition in each set of nonattainment regulations. For the reasons given below, EPA does not agree that the dual

definition is either illegal or unsound from a policy standpoint. In addition, the agency has decided that the dual definition should be used regardless of whether the SIP is complete or incomplete. EPA agrees with the commenters that there is little support in the statute for defining "source" according to the complete or incomplete status of the SIP, and that the proposed definition was complicated.

The dual definition, by defining individual units as a "source," will bring more units in for review in areas with unhealthy air and thereby result in reducing emissions from the status quo. The legislative history of the Act indicates that new source review was intended to be an important tool in the drive towards attainment of ambient air quality standards. As the House Report stated:

> [M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth. This is particularly true in light of the requirement for reasonable further progress and the indications that emissions from many existing sources in nonattainment areas will be increasing (due to fuel switching, natural gas curtailments) or remaining static (due to delayed compliance orders, et cetera). Finally, the technology forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas. For all these reasons, the committee adopted the requirement for proposed new or modified major stationary sources in nonattainment areas to meet the lowest achievable emission rate requirement.

H. Rep. No. 95-294. 95th Congress, 1st Sess. 215 (1977). In addition, after hearing testimony that no steel sources owned by five major steel companies were in compliance, the House inserted into section 173 a requirement that the owner of a proposed source or modification demonstrate that all other sources owned, operated, or controlled by him in the state are in compliance with the applicable SIP. *Id.* at 210–213. In this way, Congress meant to use new source review as a means of cleaning up *existing* sources as well.

To realize this goal fully, Congress intended that new source review be applied to the greatest extent possible. For example, Senator Muskie, in presenting the Clean Air Act

Amendments of 1977 to the Senate, spoke of reviewing "any physical change which increases [emissions] * * *," and he went on to note:

> Thus, [under the offset ruling and Part D NSR requirements] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a new reduction from previous emission levels. 123 Cong. Rec. at S 13702 (daily edition, August 4, 1977).

Since the dual definition would bring in more sources or modifications for review than would the plant-wide definition used for PSD purposes (including many replacement facilities which would not be reviewed under a plant-wide definition), use of the dual definition clearly is more consistent with Congressional intent.

The dual definition also is consistent with *Alabama Power* and *ASARCO*. *Alabama Power* held that EPA had broad discretion to define the constituent terms of "source" so as best to effectuate the purposes of the statute. Different definitions of "source" can therefore be used for different sections of the statute. *See* 13 ERC at 2039. As EPA discussed in detail in its proposal, the purpose of the nonattainment provisions is to "positively reduce emissions," not merely to hold emissions constant. In addition, unrestricted use of meeting emissions at an entire plant in nonattainment areas would make attainment more difficult, since many of the limited number of cost-effective opportunities to reduce emissions will in fact be used to avoid review. *See* 44 FR 51932. The dual definition therefore comports with the purposes of Part D of the Act.

Moreover, *Alabama Power* and *ASARCO* taken together suggest that there is a distinction between Clean Air Act programs designed to *enhance* air quality and those designed only to *maintain* air quality. In *ASARCO*, the Court of Appeals for the District of Columbia Circuit struck down the definition of "source" for new source performance standards (NSPS), which had employed a "bubble" concept. An impor-

tant element in the court's decision was its belief that the "bubble," by allowing sources to escape NSPS, was inconsistent with the purpose of NSPS, which was to improve air quality. *See* 578 F.2d at 327-28. But in *Alabama Power*, the same court held that for PSD purposes, EPA must use a "bubble" approach, precisely because PSD is designed to maintain air quality and therefore deals with "a significantly different regulation and statutory purpose." 13 ERC at 2044.

Under this analysis, use of a plant-wide definition to avoid new source review would appear to be inappropriate in nonattainment areas, since the purpose of nonattainment SIPs is to improve existing air quality so as to attain the ambient air quality standards. EPA therefore believes that it would be more consistent with the purposes of the Act not to permit states to choose a plant-wide definition of source.

Promulgation of the dual definition follows the mandate of *Alabama Power*, which held that, while EPA could not define "source" as a combination of sources. EPA had broad discretion to define "building," "structure," "facility," and "installation" so as to best accomplish the purposes of the Act. 13 ERC at 2039. This holding contemplates that one term (such as "building") may be more inclusive than another term (such as "installation"), and so a "building" may include many "installations." In this way, a "source" can, under *Alabama Power*, be composed of smaller "sources," yet not be a combination of sources. The dual definition fits into *Alabama Power*, since under EPA's definitional scheme, a "source" is either an individual piece of process equipment or the entire plant; it is not a combination of sources. That is, when deciding whether a source must undergo new source review, the reviewing authority must determine whether there was a significant increase in emissions at either a "major" individual piece of equipment or at the plant as a whole. Wherever such an increase occurs is a "source." Thus the plant itself is a source, not a combination of sources, although it may contain smaller sources.

EPA recognizes that use of different definitions for PSD

and nonattainment areas adds to the complexity of the permitting process. But this additional complexity is outweighed by the need for a more inclusive definition of source in nonattainment areas in order to assure attainment of standards.

Although it is claimed that some sources may not be willing to modernize their facilities due to the perceived added expense of LAER and the need to demonstrate statewide compliance, EPA believes that its approach is justified by the fact that the dual definition will bring in more sources and modifications for review and will require better pollution control technology in nonattainment areas.[10]

EPA disagrees that use of a plant-wide definition would allow a plant with a new installation to achieve the same emissions reductions as LAER, but in a less expensive manner by finding offsets elsewhere in the plant. This argument assumes that LAER is markedly more costly than the requirements that would otherwise apply. EPA believes that its own past actions, and those of the states, indicate that LAER need not and is not generally being interpreted in this manner.

EPA believes, and most commenters agreed, that new facilities should install state-of-the-art control technology. Such a requirement is imposed by the Clean Air Act for major new sources in PSD areas (BACT), for major new sources in nonattainment areas (LAER), and whenever EPA has set new source performance standards (NSPS). EPA therefore intends to interpret the LAER requirement in a reasonable manner, as it believes it has in the past, and to take a close look whenever LAER would be substantially stricter than these other requirements.

EPA intends that its interpretation of "building, structure,

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[10] Contrary to one commenter's argument, EPA believes that the dual definition will not cause sources to locate in clean areas. Any such source would be subject to PSD review in any event.

and facility" be identical to that for "building, structure, facility or installation" used for PSD purposes.[11]

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Emission Offset Interpretative Ruling

3. Sections I, II, III and IV of the Emission Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979) and 45 FR 31307 (May 13, 1980), are amended as follows:

A. By adding a new third paragraph to Section I, to read as follows:

I. Introduction

* * * * *

The requirement of this Ruling shall not apply to any major stationary source or major modification that was not subject to the Ruling as in effect on January 16, 1979, if the owner or operator:

A. Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

B. Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

C. Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

B. By revising Section II, subsection A, to read as follows:

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[11] One commenter requested EPA define "source as one emitting the criteria pollutants, and not "any pollutant regulated under the Act," EPA has decided to retain its definition, since it comports with section 302(j) of the Act. However, pursuant to section 172(b)(6) EPA will require new source review permits only for those pollutants for which an area has been designated nonattainment and for which the source is major.

II. Initial Screening Analyses and Determination of Applicable Requirements.

A. *Definitions*—For the purposes of this Ruling:

1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

2. "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement, (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

3. "Installation" means an identifiable piece of process equipment.

* * *

9. "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this Ruling. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

* * *

State Plans For New Source Review For Nonattainment Purposes.

4. Section 40 CFR 51.18(j) is amended to read as follows:

§ 51.18 Review of new stationary sources modifications.

* * * * *

(j) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(iii) "Installation" means an identifiable piece of process equipment.

* * * *

(ix) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account

in assessing whether a new source performance standard is applicable to such stationary source.

* * *

Restrictions on Construction For Nonattainment Areas

5.40 CFR 52.25 is amended by adding new paragraphs (f), (g), (h) and (i) to read as follows:

§ 52.24 Statutory restriction on new stationary sources.

* * * * *

(f) The following definitions shall apply under this section.

(1) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(2) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e, which have the same two-digit code) as described in the following document, *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(3) "Installation" means an identifiable piece of process equipment.

* * *

(9) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection.

5. **Proposed Rulemaking to Amend Definition of "Source" and to Delete "Reconstruction" Rule in EPA's Nonattainment Area Regulations, 46 Fed. Reg. 16280 (March 12, 1981)**

40 CFR Parts 51 and 52

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans
AGENCY: Environmental Protection Agency.
ACTION: Proposed rules.
SUMMARY: EPA regulations published on August 7, 1980 (45 FR 52676) adopted a different definition of "source" for the PSD rules (which require review of new or modified major sources in clean air areas) than for the nonattainment area new source review rules (which govern review of new or modified major sources in area where air quality does not meet Federal standards). Under the PSD rules a source is, in essence, an entire plant. Under the current nonattainment area rules a source is *either* an entire plant *or* an individual piece of process equipment within the plant. EPA is now proposing to conform the nonattainment area definition of source to that contained in the PSD rules by changing the nonattainment area definition to source to be an entire plant only. The practical significance of this change will be to reduce the coverage of nonattainment area new source review. The same change will also apply to the rules governing the construction moratorium under Section 110(a)(2)(I) of the Act (which prohibits major new construction in nonattainment area lacking EPA-approved State Implementation Plans), which will similarly shrink the coverage of the moratorium. In addition, EPA proposes to drop its current requirement that "reconstructions" be subject to nonattainment area new source review.
DATES: The deadline for submitting comments is April 13, 1981.
ADDRESS: Comments should be addressed to Michael Trutna, Standards Implementation Branch (MD-15), Office of Air

Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919-541-5292.

FOR FURTHER INFORMATION CONTACT: Michael Trutna (919-541-5292) or Eric Smith (202-755-0788).

SUPPLEMENTARY INFORMATION: On August 7, 1980 EPA published amended rules affecting PSD new source review, nonattainment area new source review and the construction moratorium. 45 FR 52676. The Prevention of Significant Air Quality Deterioration (PSD) program requires new or modified "major"[1] air pollution sources locating in areas where national ambient air quality standards (NAAQS) are being attained (or where air quality data is insufficient to determine whether or not NAAQS are being attained) to obtain construction permits which meet the requirements of Part C of Title I of the Clean Air Act. The basic purpose of the PSD program is to protect air quality in clean air areas. In areas where NAAQS are not being attained new or modified "major"[2] sources which would emit the pollutant(s) for which the area is nonattainment must obtain construction permits under Section 173 of the Act. In addition, where a nonattainment area lacks an EPA-approved State Implementation Plan (SIP) that meets the requirements of Part D of Title I of the Act, new or modified major sources that would emit the nonattainment pollutant(s) may not construct at all. This "construction moratorium" is required by Section 110(a)(2)(I)

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[1] "Major" sources for PSD purposes are those which emit more than either 100 tons per year or 250 tons per year (depending on the type of source) of any pollutant. See Section 169(1) of the Act. 40 CFR 51.24(b)(1), 52.21(b)(1).

Each new "major" source must get a permit. In addition, any modification to a major source that causes a "significant" increase in emissions must get a permit. "Significant" increases in emissions are specified at 40 CFR 51.24(b)(23)(i), 52.21(b)(23)(i).

[2] "Major" sources for nonattainment purposes are those which emit more than 100 tons per year. 40 CFR 51.18(j)(v).

The "modification" test for nonattainment areas is the same as for PSD. See 40 CFR 51.18(j)(1)(xii).

of the Act. See 40 CFR 52.24. The definitions in EPA's regulations governing the applicability of the construction moratorium are the same as those used in the nonattainment new source review rules 40 CFR 52.24(f).

EPA's amended rules define "source" differently for PSD and nonattainment purposes. The difference revolves around the treatment of a plant that contains a number of individual pieces of process equipment that themselves each emit more than 100 tons per year. For PSD, EPA generally defines "source" in terms of an entire plant. For the nonattainment program, however. EPA defines "source" as both the entire plant and each of those "major" pieces of process equipment within it.

An example will show how these different definitions work. Suppose that a plant has three pieces of process equipment each of which has a potential to emit about 400 tons per year. The owners of the plant decide to expand operations at one piece of equipment resulting in an increase of 70 tons per year of a criteria pollutant,[3] and they further intend to curtail operations at another piece of equipment so as to reduce emissions of the same pollutant by 70 tons per year. If the plant were subject to PSD requirements, these changes would not "modify" any "source". The plant as a whole is the source, and since the reduction at the second piece of equipment balances the increase at the first, there is no significant plant-wide increase in emissions. As noted earlier, a change at a source is not a modification subject to review unless it results in a significant overall increase in emissions. Thus, no permit would be needed. But if the plant were located in an area which is nonattainment for the pollutant involved, then each piece of process equipment is independently viewed as a source and the change at the first piece of equipment would have to undergo preconstruction review, because the piece of equipment is *itself* a major source and there is a significant

[3] A criteria pollutant is one for which EPA has established a NAAQS.

net increase in emissions at that source. Compensating reductions obtained elsewhere at the plant could not be used to escape review, because these reductions did not occur at the same "source."

There would be similar potential for differing results if the plant added a new piece of equipment with a potential to emit 300 tons per year. For PSD purposes, the relevant "source" is the plant, so that if the plant reduced emissions by 300 tons per year at the existing equipment, there would be no net increase at the source. But for nonattainment purposes, the new piece of equipment is itself a major source and so would be subject to review (or the construction moratorium) even if there had been no significant increase in emission from the plant as a whole.

These different definitions of source mean that more new construction projects are subject to review in nonattainment areas (or, if there is no EPA-approved Part D SIP, more new construction projects are subject to the construction moratorium) than in areas subject to PSD requirements.

EPA also requires new source review in nonattainment areas based on a capital investment test of "reconstruction". Specifically, whenever a company rebuilds a "source" so that more than 50% of the capital in it represents new investment, EPA will require new source review no matter how emissions are affected.

The Proposed Amendment

EPA today is proposing to change the definition of "source" contained in the rules governing nonattainment area new source review and the construction moratorium so as to make that definition conform to that contained in the PSD rules. The result will be to eliminate the differences in coverage between the PSD and nonattainment programs that were described above. The change is being carried out by amending the definition of the terms "building", "structure", "facility" and "installation", which are the components of the term "source." EPA is also proposing to delete the definition of "reconstruction."

Discussion

The decision to reconsider the scope of nonattainment area new source review has been made in the context of a Government-wide reexamination of regulatory burdens and complexities that is now in progress. EPA has also reevaluated all of the arguments on all sides of these definitional issues. The Agency has concluded that the amendments to the August 7 rules being proposed today will substantially reduce the burdens imposed on the regulated community without significantly interfering with timely achievement of the goals in the Clean Air Act.

The issue of the proper scope of the nonattainment area definition of "source" is not a clear-cut legal question. The statute does not provide an explicit answer, nor is the issue squarely addressed in the legislative history. The D.C. Circuit (in *Alabama Power Co.* v. *Costle*) has stated by implication that EPA has substantial discretion to define the constituent elements of this term.

The question thus involves a judgment as to how to best carry out the Act. Two issues have been reexamined here. The first is whether the definition of "source" in nonattainment areas should be modified to conform to the one in PSD areas. The second is whether new source review based on "reconstruction" should be required at all.[4]

EPA believes for the following reasons that the proposed changes in the definition of "source" is appropriate.

1. The August 7 definition forbids *any* construction or modification of major pieces of process equipment in areas where the construction moratorium is in effect, even where no increase in emissions at a plant would result. There are a substantial number of such nonattainment areas nationwide at present.

2. Even outside of these "construction moratorium" areas under the present regulatory scheme the August 7 definition

[4] Of course, States always retain the right to choose to impose more stringent new source requirements than Federal rules mandate.

can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities.

3. For both these reasons, under the current overall regulatory system, the August 7 definition can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones.

4. The proposed definition would simplify EPA's rules by using the same definition of "source" for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency.

5. States will remain subject to the requirement that for all nonattainment areas they demonstrate attainment of NAAQS as expeditiously as practicable and show reasonable further progress toward such attainment. Thus, the proposed change in the mandatory scope of nonattainment new source review should not interfere with the fundamental purpose of Part D of the Act.

6. New Source Performance Standards (NSPS) will continue to apply to many new or modified facilities and will assure use of the most up-to-date pollution control techniques regardless of the applicability of nonattainment area new source review.

7. In order to avoid nonattainment area new source review, a major plant undergoing modification must show that it will not experience a significant net increase in emissions. Where overall emissions increase significantly, review will continue to be required.

For these reasons EPA has reconsidered the concerns it expressed in the August 7 preamble (See 45 FR 52697-8) and has decided that the "dual definition" is excessively and unnecessarily burdensome.

In light of the change to the nonattainment area definition of source, there is good reason to abandon the "reconstruction" test for nonattainment area new source review. That test by itself only requires review in cases where there is reconstruction, but a "significant" increase in emissions is

absent. With a plant-wide definition of source, the reconstruction provision would only trigger review in cases of plant-wide reconstruction. Few instances of plant-wide reconstruction are expected. Thus, there is little justification for the added complexity this provision entails. Moreover, this change will further reduce inconsistency with the PSD rules which do not have a reconstruction provision.

The Clean Air Act, in Section 111, recognizes an independent, long-term interest in making sure that new facilities install state-of-the-art pollution controls when they are built. This results in the most cost-effective long-term air quality improvement by controlling pollution at the design stage, rather than requiring costly retrofits. Of course, this approach, unlike the nonattainment area requirements of Part D, is not based on the location of particular sources.

For these reasons, EPA believes that a "reconstruction" definition is appropriate for the new source performance standards under Section 111. However, the arguments for it are considerably weaker where a program of review basically designed to meet air quality standards in particular places is at issue and EPA proposes to drop it there.

EPA solicits comments on the proposed rule. All such comments will be carefully considered prior to any final action.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that the attached proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposal will reduce regulatory burdens since fewer sources will be subject to new source review and the construction moratorium.

The Director of the Office of Management and Budget, acting under Section 8(b) of Executive Order 12291, has granted this proposal an exemption from the provisions of that order because of its burden-relieving and deregulatory nature.

This Notice of Proposed Rulemaking is issued under Section 301 of the Clean Air Act, 42 U.S.C. Sec. 7601.

Dated: March 6, 1981.

Walter C. Barber, Jr.,
Acting Administrator.

1. Section II. Subsection A of the Emissions Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979), 45 FR 31307 (May 13, 1980), and 45 FR 52741 (August 7, 1980) is proposed to be amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph 2 to read "Building, structure, facility or installation";

b. By removing paragraph 3 and renumbering the succeeding paragraphs accordingly, and

c. By removing paragraph 9 and renumbering the succeeding paragraphs accordingly.

§ 51.18 [Amended]

2. Section 40 CFR 51.18(j)(1) is proposed to be amended as follows:

a. By changing the words "Building, structure of facility" at the beginning of subparagraph (ii) to read "Building, structure, facility or installation";

b. By removing subparagraph (iii) and renumbering the succeeding subparagraphs accordingly, and

c. By removing subparagraph (ix) and renumbering the succeeding subparagraphs accordingly.

§ 52.24 [Amended]

3. Section 40 CFR 52.24(f) is proposed to be amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of subparagraph (2) to read "Building, structure, facility or installation";

b. By removing subparagraph (3) and renumbering the succeeding subparagraphs accordingly, and

c. By removing subparagraph (9) and renumbering the succeeding subparagraphs accordingly.

[FR Doc. 81-7764 Filed 3-11-81; 8:45 a.m.]

6. Final Rule Amending Definition of "Source" and Deleting "Reconstruction" Rule in EPA's Nonattainment Area Regulations, 46 Fed. Reg. 50766 (October 14, 1981)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL 1919–3]

Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On August 7, 1980 (45 FR 52676), EPA promulgated rules for review of major new sources and major modifications in areas where air quality does not meet federal standards (nonattainment areas). Those rules defined "source" in essence as *either* an entire plant *or* an individual piece of process equipment within the plant. On March 12, 1981 (46 FR 16280), EPA proposed to change the definition of source to be an entire plant only. That proposal is being promulgated as a final rule today. The practical significance of this change will be to reduce the coverage of nonattainment area new source review (NSR). The same change will also apply to the rules governing the construction moratorium under Section 110(a)(2)(I) of the Clean Air Act (which prohibits major new construction in nonattainment areas lacking a State Implementation Plan (SIP) approved by EPA under Part D of the Act). This change will similarly shrink the coverage of the moratorium.

EPA's August 7 rules also required reconstructed facilities to undergo nonattainment area NSR. As was proposed on March 12, EPA is also deleting that requirement today. These changes will allow states to reduce the regulatory burden of new source review programs without impeding timely attainment and maintenance of air quality standards.

DATES: This rule is effective on October 14, 1981.

FOR FURTHER INFORMATION CONTACT: Kirt Cox. Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711. 919-541-5592.

SUPPLEMENTARY INFORMATION:

1. Background

A. Definition of Source

Under the Clean Air Act, all major new stationary sources and modifications to existing major sources must obtain a permit before they may construct—a Prevention of Significant Deterioration (PSD) permit if the source or modification locates in an area which is cleaner than a national ambient air quality standard (NAAQS), or a nonattainment permit if the source or modification locates in a nonattainment area. The Act defines a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." Section 111(a)(3).[1]

In *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), the United States Court of Appeals for the District of Columbia Circuit held that EPA has discretion to define the constituent terms of the definition of "source" (*i.e.*, the terms "building," "structure," "facility," and "installation") so as to meet the purposes of the various NSR programs mandated by the Act. On August 7, 1980, EPA promulgated amended rules affecting PSD NSR, nonattainment NSR, and the construction moratorium to take into account the court's holding. 45 FR 52676 (August 7 rules). For PSD purposes, EPA defined "source" in essence as an entire plant (the "plantwide" definition). But for nonattainment purposes, EPA

[1] Where a state does not have an approved plan in place for cleaning up a nonattainment area, the Act imposes a moratorium on construction of major new sources and modifications in that nonattainment area (construction moratorium).

defined "source" as both the entire plant and each piece of process equipment at the plant (the "dual" definition).[2]

The practical significance of these different definitions largely lies in the number of modifications each definition would bring in for review. EPA's August 7 rules define a "modification" as a significant net increase in emissions at a source. *See, e.g.*, 45 FR 52747. Since the PSD definition defines "source" in essence as a plant, only net increases occurring at the entire plant need a PSD permit. For example, if a plant increased emissions at one piece of process equipment, but reduced emissions by the same amount at another piece of process equipment at the plant, then there would be no net increase in emissions at the plant, and therefore no modification to the "source." But under the nonattainment definition, the piece of process equipment itself is a "source," which means that only equivalent reductions at that particular piece of process equipment would enable the source to avoid the need for a nonattainment permit. As a result, the nonattainment definition affords fewer opportunities for a source to use a reduction in emissions to compensate for an increase at the source, and therefore avoid the need for a permit.

EPA promulgated a plantwide definition for the PSD program pursuant to *Alabama Power*. *See* 636 F.2d at 397; 45 FR 52695, 52730, 52736 (August 7, 1980). But EPA adopted the more inclusive dual definition for nonattainment areas in order to most effectively use NSR to aid in the cleanup of nonattainment areas. *See* 45 FR 52697 (August 7, 1980). EPA asserted that a narrow definition of source brings in more sources for review, which will enable states to ensure more reductions in emissions through new source permitting. These additional reductions from permitting were said to arise from

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[2] Formally, for PSD purposes, EPA defined each of the terms "building," "structure," "facility," and "installation" as an entire plant. However, for nonattainment purposes. EPA defined "Building, structure or facility" as an entire plant and "installation" as a piece of process equipment.

the greater applicability of the provision in Section 173(1)(A) of the Act (which was adopted by most states) that a new source or modification must obtain offsetting reductions in emissions which are greater than the increase from the new source or modification. EPA further noted that the permit requirement also brings into play Section 173(3) of the Act, under which the owner of a proposed new source of modification must certify that all other sources owned, operated, or controlled by him are in compliance with the applicable State Implementation Plan. Finally, EPA felt that increased applicability of the construction moratorium through use of a narrow definition of source would serve as a strong incentive for states to develop plans to clean up their nonattainment areas.

However, on March 12, 1981, EPA proposed to delete the dual definition for nonattainment areas and to substitute a plantwide definition identical to that of the PSD program. 46 FR 16280. EPA stated that it could, by adopting a plantwide definition, reduce these regulatory burdens and complexities associated with NSR and the construction moratorium without interfering with timely attainment of the NAAQS in accordance with the Act. In particular, EPA argued that by bringing in more sources for review or subjecting them to the construction moratorium, the dual definition was discouraging replacement of older, dirtier processes with new cleaner ones. It thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air. In addition, EPA noted that a source would still be subject to any applicable new source performance standards (NSPS) and that significant net increases at a plant as well as wholly new plants, still would undergo nonattainment review. Third, EPA stated that its proposal would simplify the regulatory process by adopting the same definitions for PSD and nonattainment permits. Finally, EPA stated that even if a state adopted a plantwide definition, it nonetheless had to demonstrate attainment of the NAAQS and reasonable further progress (RFP) towards attainment by the statutory deadlines. For these reasons, EPA concluded that the dual

definition was unnecessarily burdensome, and so should be deleted.

B. Reconstruction

EPA's August 7 rules also required reconstructed or replacement facilities to undergo NSR in nonattainment areas as if they were new sources. Specifically, the rules provided that whenever a company rebuilt a "source" so that more than 50 percent of its capital cost represented new investment, that rebuilt source had to obtain a nonattainment permit. EPA did not adopt a similar provision for PSD, because few if any whole plants are likely to be rebuilt.

On March 12, 1981, EPA proposed to delete this requirement. EPA stated that since it was proposing to use a plantwide definition for nonattainment areas, and since few entire plants are likely to be rebuilt, there is little need for review of reconstructions. In addition, this change would further reduce the differences between PSD and nonattainment NSR.

II. Today's Action

A. Definition of Source

EPA has decided to adopt the plantwide definition of source and to delete the reconstruction requirement as it proposed last March. After evaluation of the comments received, EPA has concluded that two concerns warrant this approach to NSR.

First, today's action means that both the PSD and nonattainment programs will use the same definition of "source." This alone will reduce regulatory complexity. Sources will no longer have to figure out what an "installation" is, which should lessen any confusion engendered by EPA's August 7 rules.

Second, and more important, by removing the requirement that states adopt a dual definition, EPA is acting consistently with the purposes of Part D of the Act. Congress expressly provided that states are to play the primary role in pollution

control. Sections 101(a)(3), 101(b). It also intended that states retain the maximum possible flexibility to balance environmental and economic concerns in designing plans to clean up nonattainment areas. *See, e.g.*, Sen. Rep. 95–127 at pp. 10–11; *cf. NRDC* v. *Train*, 421 U.S. 60 (1975). Today's action follows this mandate by allowing states much greater flexibility in developing their nonattainment area NSR programs and attainment demonstrations. Since demonstration of attainment and maintenance of the NAAQS continues to be required, deletion of the dual definition increases state flexibility without interfering with timely attainment of the ambient standards, and so is consistent with Part D.

This rulemaking in no way affects either the current status of any EPA-approved SIP or the state's duty to assure RFP and attainment of the NAAQS by the statutory deadlines. All state plans containing the dual definition and the reconstruction provisions remain fully valid after this rulemaking. States may, however, choose to adopt a plantwide definition, provided that they submit that change to EPA as a SIP revision.

States choosing to delete the dual definition must demonstrate that their plans, as revised, continue to demonstrate RFP and attainment. Many state plans are based in part upon a projection of reductions in emissions obtained through the state's NSR program. This projection in turn rested upon an anticipated number of permit applications. Use of a plantwide definition would mean that many sources will no longer need a permit. Unless counterbalanced by other consequences of the deletion (*e.g.*, more rapid construction of new clean emission units), this may result in the loss of reductions originally expected by the state. In other instances, where RFP demonstrations were more general in nature, states relied on the NSR program to assist in their enforcement efforts and to identify additional more efficient means to control emissions. In either case, a state's RFP demonstration, which was predicated on those assumptions for NSR coverage, might no longer apply; and the state might have to obtain or guarantee those reductions in other ways (such

as requiring additional reductions from existing sources and stepping up enforcement efforts). States changing from a dual to a plantwide definition must therefore reassess their general attainment strategies and revise them as necessary to ensure RFP and attainment by the statutory deadlines.

A related problem may arise if a state decides to rescind existing nonattainment permits. A modification which required a permit under the dual definition may not have needed one had the plantwide definition been in effect, and some states may choose to rescind those permits and reissue them with conditions more favorable to the affected sources (such as deleting the requirement that the source install the technology assuring the lowest achievable emission rate (LAER)). However, the emissions reductions required by that permit may have been included in the state's RFP demonstration, and rescission might therefore damage that demonstration. States should thus be careful that, in designing any rescission procedure, they do not interfere with RFP and attainment. Any such rescission procedure must be submitted to EPA as a SIP revision and must assure that each rescission is consistent with the state's RFP demonstration.[3]

B. Reconstruction

EPA is also taking a final action today to delete the requirement that reconstructed facilities (as that term is defined in the rules) be subject to nonattainment requirements. The rationale for that decision is the one offered in the proposal: Adoption of the plantwide definition means that the reconstruction requirement applies only to entire plants which are rebuilt. Since few if any such reconstructions are anticipated, there is little reason to retain this requirement. In addition, deletion of the requirement makes the PSD and nonattainment rules the same in this respect.

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[3] Permit rescissions granted under an EPA-approved permit rescission procedure would not have to be submitted to EPA as a SIP revision.

As with the dual definition, some state plans may be based upon emission reductions obtained from the reconstruction provision. States choosing to delete this requirement should therefore assess and adjust their RFP and attainment demonstrations as necessary.

III. Response to Comments

EPA received 81 comments in response to its March 12 proposal, the majority of which favored deletion of the dual definition and the reconstruction requirement. The particular comments, as well as EPA's response, are discussed below.

A. Modernization

Many commenters who agreed with the proposal stated that it would be conducive to modernization of existing plants and so would enhance economic efficiency. These commenters also agreed that the dual definition acted as a disincentive to replacement of outmoded dirty facilities with newer cleaner ones, and some cited specific examples where this in fact has happened. Other commenters, however, noted that EPA had cited no data to corroborate its claim that the dual definition impeded modernization, and argued, also without supporting data, that the direct cost of offsets and of the installation (pursuant to Section 173(2)) of technology resulting in LAER was so much less than the total cost of a modified plant that it did not act as a disincentive.

EPA believes that the examples provided by the commenters support its statement in the proposal that the dual definition impedes legitimate efforts to modernize existing plants. (*See e.g.*, comments of Crown Zellerbach: Union Oil Corporation.) This is particularly true in areas subject to the construction moratorium, where plants cannot modernize a particular facility, even if emissions at the plant as a whole actually *decrease*. To deny construction to candidate modernization projects which would cause no significant increase in air pollution at the plant, and which in some cases would produce a net air quality improvement, may call upon such

projects to bear an unacceptably large part of the overall burden for cleaning up a nonattainment area. Accordingly, EPA has concluded that elimination of the dual definition requirement will remove a barrier to modernization of the nation's industrial base.

A related issue raised by some commenters was that deletion of the dual definition would actually result in more economic inefficiency in the nonattainment area as a whole. The argument here rests on two claims. First, installation of technology representing LAER means the new source will have lower emissions and thus need fewer offsets: sources not installing LAER would need more offsetting reductions to avoid the need for a permit. Deletion of the dual definition therefore would mean that more cost-effective reductions would be used up quickly, leaving fewer reductions available over the long term. This would make it more difficult for new sources to find needed offsets and so could actually impede growth over time; and if additional reductions were needed to attain the NAAQS, they could only be obtained by imposing additional controls on existing sources, controls which would require costly retrofits. Second, the proposal was alleged to favor large existing sources over new sources, because many existing sources have significant amounts of available emission reductions that can be used to avoid the need for a permit, whereas new sources would always have to undergo nonattainment area NSR. This means that existing sources might use up all the available reductions, and so preclude all new construction.

The concerns raised by these commenters are at this point speculative, particularly in view of the fact that the commenters provided no data to support their claims. In addition, they contradict a central principle of economic efficiency, under which the cheapest and most cost-effective emission reductions should be allowed to be used first, not saved until some hypothetical future need develops while more expensive controls are used first. More importantly, given the structure of the Act, EPA believes that the choice of whether to take the risks these commenters mention is one properly made by

the states, not the federal government. If a state feels that the long-term risks of the plantwide definition outweigh its potential short-term benefits, then that state may properly retain the dual definition. But this kind of decision is essentially based on economic factors, not air quality concerns, and so is appropriately left to the states. *cf. Union Electric Co. v. EPA*, 427 U.S. 246 (1976).

B. Regulatory Complexity

Supporters of the proposal endorsed it as a means of simplifying the regulations, thereby reducing some of the confusion in the permit review process and eliminating an inconsistency with the PSD program. Other commenters asserted that the dual definition adds only slightly to the complexity of the regulations and that anyone who carefully reviews the regulations can readily understand the way in which the definition works.

EPA believes that elimination of the dual definition clearly simplifies what any objective observer would agree is a quite complex regulation. First, plants sometimes must get a PSD permit for one pollutant and a nonattainment permit for another pollutant. Using the same definition for PSD and nonattainment purposes simplifies the permit process. Second, by defining "source" in essence as an entire plant, EPA has eliminated the problem of determining what an "installation" is in a given situation.

C. Application of Control Technology

Many commenters agreed that adequate use of the most up-to-date control technology is assured, regardless of the applicability of nonattainment area NSR, because NSPS will continue to apply to many new or modified facilities. Other commenters argued, however, that there is no applicable NSPS for many categories of sources, and that NSPS is often not as stringent as LAER. These commenters also claimed that Congress intended that all new sources must install some form of advanced pollution control technology, particularly in

nonattainment areas where the maximum possible emission reductions must be obtained.

EPA has embarked upon an expanded program of NSPS development. *See* 40 CFR 60.16. This program will assure that most major emitting source categories will be covered by an NSPS. Accordingly, EPA believes that eventually the NSPS program will ensure that new and modified sources will adequately apply state-of-the-art control technology. To the extent that the controls imposed are not as strict as LAER, the internal offsets needed to "net out" of NSR will make up the difference.

EPA agrees that in some cases an NSPS will be less stringent than LAER. But this comment is not wholly relevant, for while Congress intended that new or modified *sources* apply LAER, it left EPA discretion to define "source." As noted above, EPA believes that a plantwide definition of "source" is consistent with the purposes of the nonattainment provisions of the Act, and so comports with Congressional intent. Consequently, EPA's approach with regard to application of control equipment is consistent with the Act.

D. Assuring Reasonable Further Progress and Attainment

Many commenters who supported the proposal emphasized that the states will remain subject to the requirement that they demonstrate that each nonattainment area will attain the NAAQS as expeditiously as practicable and will show reasonable further progress toward attainment. These commenters thus agreed with EPA that use of a plantwide definition need not interfere with the fundamental purpose of Part D of the Act (relating to nonattainment areas). Other commenters challenged EPA's analysis, arguing that most RFP analysis, and attainment demonstrations are so imprecise that extensive NSR coverage is essential to assuring attainment and RFP. These commenters claimed that this imprecision is exacerbated by the fact that most Part D SIPs are based on deficient emission inventories. Therefore, the reviewing authority cannot say with confidence that any opportunities for emissions reductions can be ignored. They

added that this also means that even "insignificant" increases in emissions could pose a problem, since states would have difficulty using NSR to offset their cumulative impact.[4] As a result, the commenters felt it was crucial to have a comprehensive NSR system to manage air quality in nonattainment areas and assure tight control of pollution. Therefore, under these commenters' analysis, deletion of the dual definition would remove an essential state tool for clean-up of nonattainment areas. In fact, several commenters argued that EPA's approach as a whole is short-sighted, because it will enable sources to build without any review, despite the fact that such sources might have to install expensive retrofit technology when the state or EPA discovers that the area has not attained the NAAQS.

These comments miss the point. As noted above, and as correctly pointed out by several commenters, state plans *must* assure RFP and attainment by the statutory deadlines. If a state wishes to use a plantwide definition and run the risks identified by these commenters, then that state has discretion to do so, provided that its choice does not interfere with RFP and attainment. EPA believes that it is more appropriate for the states to make any needed decisions in this area, for it is the states that are closest to their own particular situations and problems and so it is the states that are best equipped to make the choices about which the commenters are concerned.[5]

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[4] One commenter erroneously claimed that EPA's rules enabled sources to increase emissions up to 100 tons per year (tpy) without having to undergo review. In fact, EPA has defined as "insignificant" (*i.e.* as below the level requiring review) emission increases which generally range from 25 tpy to to 40 tpy, depending on the pollutant in question. *See e.g.*, 45 FR 52747 (August 7, 1980).

[5] In any event, the commenters can raise these concerns at the state level during state proceedings on whether to adopt to plantwide definition.

E. Impact on State Plans

Some states asked EPA to allow them to choose the definition of source most appropriate to their own program—they were concerned that EPA's proposal would keep them from continuing to use a narrower definition. Other states pointed out that they may have no choice but to use a plantwide definition if EPA were to promulgate one, for these states have laws which prohibit them from developing SIPs which are more stringent than what EPA's rules would require. Finally, one commenter was concerned that a plantwide definition would jeopardize existing NSR rules which require permits for *all* changes at a plant, regardless of whether these changes would increase emissions at the entire plant. These rules were claimed to be necessary to keep track of the activities at different sources in the state and to monitor RFP.

By this rulemaking, EPA does not intend to require any state to change its NSR rules. Similarly, nothing in today's promulgation is meant to forbid states from requiring permits for all changes at a plant. Finally, to the extent that a state has laws which prohibit state rules from being more stringent than federal regulations, EPA recognizes that this may be a problem. States may as a result have to change either their rules or their laws.

F. Construction Moratorium

Some commenters argues that elimination of the dual definition for the construction moratorium will mean that many fewer sources will be subject to the moratorium and so will reduce the incentive for states lacking Park D plans to develop them. However, this comment ignores the fact that the primary purpose of the construction moratorium is to preserve ambient air quality while the states are preparing their plans for cleaning up nonattainment areas. A plantwide definition is consistent with this purpose, since it ensures

that emissions will not increase significantly during this time.[6] In any event, the moratorium will continue to fulfill its secondary purpose as an incentive to state action, since new sources and modifications which result in a significant net increase in emissions will still be prohibited from constructing in nonattainment areas subject to the construction moratorium.

G. Use of Standard Industrial Classification (SIC) Codes

One commenter requested that EPA expand the definition of "source" to include a group of commonly-owned plants on a contiguous property or complex. However, EPA has already considered and rejected this comment. *See* 45 FR 52695 (August 7, 1980). EPA had originally proposed a definition similar to that requested by the commenter, but it decided instead to adopt the present system, based upon SIC codes, since a broader definition would severely strain the boundaries of even the most elastic of the four terms which define the term "source," *i.e.*, "building," "structure," "facility," and "installation." EPA believes that the aggregation of separate contiguous plants under common ownership into one source would be inconsistent with the common sense notion of plant. *See Alabama Power*, 636 F.2d at 397–98.

H. Reconstruction

Most commenters also agreed that EPA should delete the reconstruction test for nonattainment NSR. Others argued that EPA should retain the test, relying basically upon the same claims as those addressed above for the dual definition. For the reasons laid out above, EPA has concluded that the adoption of a plantwide definition means that a reconstruction test no longer is needed.[7]

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[6] At the same time, the present moratorium imposes costs on plants that want to modify internally without lowering emission.

[7] Some commenters urged EPA to delete the reconstruction test from the NSPS rules. That comment is not relevant to this rulemaking, which addresses *only* requirements for new source review in nonattainment areas.

I. Legal Arguments

Many commenters adduced legal arguments to the effect that EPA lacked discretion to define "source" for nonattainment purposes. Some commenters claimed that EPA was legally compelled to adopt a plantwide definition, while others asserted that EPA must as a matter of law use a dual definition. However, in view of the lack of express statutory language and the conflicting Congressional signals found by the various commenters in the legislative history, EPA believes that it has discretion to choose a definition of "source" best suited to the nonattainment program. This authority was expressly noted in *Alabama Power*, where the court held that "EPA had descretion to define (the) statutory terms (for "source") reasonably so as to carry out the expressed purposes of the act." 636 F.2d at 396.

Those commenters who favored the dual definition raised a variety of legal arguments.[8] These claims will be addressed individually.

(1) *A dual definition is required by Alabama Power and by ASARCO v. EPA. 578 F.2d 319 (D.C. Cir. 1978).*

The commenters asserted that the *Alabama Power* and *ASARCO* cases held that where the purpose of a program is to maintain air quality, as in PSD, a plantwide definition is appropriate; but where the purpose is to *improve* air quality, a much narrower definition of "source" must be used. Since the purpose of Part D of the Act is to clean up nonattainment areas, the commenters claimed that EPA must continue to use a dual definition.

The difficulty with this claim is that it ignores the fact that states have the discretion to define the approaches best suited to their own problems and needs, provided that those approaches will demonstrate RFP and attainment. If a state

[8] One commenter requested that EPA insert each state's SIP into the record for this rulemaking. EPA is not granting this request because the SIPs have been incorporated by reference into the Code of Federal Regulations and so are documents of public record.

can demonstrate attainment despite the use of a plantwide definition of source, then EPA must approve the state's plan. Accordingly, use of a plantwide definition can be consistent with the purposes of Part D.

(2) *Use of a plantwide definition means that state plans will not demonstrate attainment as expeditiously as practicable, since fewer sources will be brought in for review.*

This objection ignores the basic point that this is a matter for the states to decide: they are still subject to the statutory requirements, but EPA beleives that they may use a plantwide definition if that will not interfere with their demonstration of attainment.

(3) *The legislative history of the Act requires that as many changes at a "source" as possible be brought in for NSR.*

This begs the question, for the legislative history and, more importantly, the statute, speak of "sources," and EPA has discretion to define what that term means for the purposes of the nonattainment program.

(4) *The definitions of "source" used in the Act themselves mandate a dual definition.*

The commenters noted that the PSD definitional structure uses only the term "facility," while NSPS and nonattainment structures use both "source" and "facility." This difference was a point on which *Alabama Power* relied to distinguish *ASARCO*. Accordingly, the commenters claim that since *ASARCO* applied to NSPS and since the terms are defined identically for NSPS and Part D (see Section 111(a)(3) and 172(b)(6)). EPA must for Part D use at least the narrow definition contained in the NSPS rules.

While it is true that the court in *Alabama Power* used the different definitional structures of NSPS and PSD to distinguish *ASARCO*, the critical element of the court's opinion rests on the fact that EPA may define the term "source" so as to best meet the purposes of a particular program. *See* 636 F.2d at 391–98. As discussed above, EPA believes that a plantwide definition is consistent with the purposes of Part D. Consequently, EPA may define the constituent terms of "source" differently for NSPS and Part D.

(5) *Congress ratified the dual definition.*

The commenters argue that in Section 302(j), Congress used the terms "source" and "facility" in defining the unit to which NSR applies, and it must have known that EPA at that time defined "facility" quite narrowly in terms of particular pieces of process equipment. Congress adopted the entire Offset Ruling in 1977, and therefore ratified the Ruling's use of a dual definition.

The difficulty with this argument is that Congress used "facility" in defining the unit to which PSD review applies. Section 165(a), yet in *Alabama Power*, the court held that EPA had discretion to interpret this term to mean in essence an entire plant. *See* 636 F.2d at 397. Moreover, Congress provided in Section 129(a)(1) of the Clean Air Act Amendments of 1977 that EPA could modify the Offset Ruling "by rule." It therefore contemplated that EPA could make the kind of change to the Ruling being made today.

(6) *Congress definition of LAER implies that it chose the dual definition.*

The commenters claim that LAER is supposed to be applied to a "source," Sections 171(3), 173(2), yet LAER actually is applied to pieces of process equipment. In addition, the LAER definition references any applicable NSPS, and NSPS applies to pieces of process equipment. From this, the commenters infer that Congress intended "source" to be defined at least as a piece of process equipment.

This argument was implicitly rejected by *Alabama Power*. The PSD program requires that "sources" install the Best Available Control Technology (BACT). BACT is also applied to pieces of process equipment, and it also refers to any applicable NSPS. Yet *Alabama Power* authorized EPA to define "source" as in essence plant for PSD purposes. Consequently, the use of the term "source" in the definition of LAER does not necessarily mean that "source" must be defined narrowly for nonattainment purposes.

(7) *EPA's proposal treats reconstructions as modifications, yet the Act requires that they be treated as new sources.*

The commenters assert that Section 173 uses the phrase

"by the time the source is to commence operation," which means Congress was referring only to new sources. Moreover, they argue that when a facility is replaced or rebuilt it is first shut down, which means that there is no "source" to modify. As a result reconstruction must obtain a NSR permit as new source, not modifications.

The language to which the commenters refer applies to *both* new sources and modifications, not soley to new sources as the commenters suggest. *See* Sections 172(b)(6), 173(1)(A). Any other reading of Section 173 would read all modifications out of the Act, which clearly is contrary to the statute. In addition, this argument begs the question, for it assumes that the "source" is a piece of process equipment. Yet the issue is precisely how to define "source," and this is a matter left to EPA's discretion.

(8) *EPA did not provide the factual basis for its proposal, as mandated by Section 307(d)(3)(A) of the Act.*

EPA does not believe that it is required to follow Section 307(d) in this rulemaking. That section only applies to particular types of EPA actions, of which only Section 307(d)(1)(B) is relevant here. That subsection requires Section 307(d) procedures for federal promulgation of a SIP. Here, EPA is modifying regulations codified at 40 CFR Part 51, which are minimum requirements for the content of SIPs, and not promulgation of SIPs themselves. Consequently, these rules clearly are not subject to Section 307(d). The construction moratorium, which is also the subject of today's action, is codified at 40 CFR Part 52, but it is a *generic* rulemaking, not a rulemaking for a particular SIP, and so is not subject to Section 307(d) either.[9]

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[9] It should also be pointed out that the issue of the definition of "source" in nonattainment areas has been before the public for several years. EPA first solicited comments on its definition on January 16, 1979, when it modified the Offset Ruling. *See* 44 FR 3298. Many comments were received at that time. On September 5, 1979, EPA solicited further comments on this issue, when it proposed comprehensive amendments to its PSD and nonattainment

IV. Conclusion

By today's action EPA is modifying the definition of "installation" to mean the same as "building, structure, and facility," and is deleting the definition of "reconstruction" and its supporting definition of "fixed capital cost." These actions apply to the Offset Ruling (codified at 40 CFR Part 51 Appendix S), 40 CFR 51.18(j) (requirements for new source review in nonattainment areas), and 40 CFR 52.24 (the construction moratorium). They will have the effect of defining a "source" for nonattainment purposes as in essence an entire plant, and of treating reconstruction and replacement as a modification to an existing source, rather than as a new source.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this action will not have a significant economic impact upon a substantial number of small entities. These rules will reduce regulatory burdens since fewer sources will be subject to NSR and the construction moratorium. Since the requirements of the Clean Air Act apply to all sources defined as major, EPA did not have the additional flexibility to alter the applicability of these requirements to any small entities that meet the definition of major source.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not major because it reduces the coverage of monattainment area NSR and the construction moratorium and so lessens regulatory burdens.

This action was submitted to the Office of Management and Budget (OMB) for review as required by the Order. Any comments from OMB to EPA and any EPA response are available for public inspection at the Central Docket Section.

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regulations. *See* 44 FR 51924. Accordingly, even if Section 307(d) were applicable, the commenters have had adequate opportunity to raise their concerns to EPA and have presented no evidence that they were harmed by EPA's failure to follow precisely the procedures set out in the Section.

U.S. Environmental Protection Agency, West Tower, 401 M Street, SW., Washington, D.C. 20460 (Docket A–81–14)

Pursuant to 5 U.S.C. 553(d)(1), this action is being made immediately effective because it relieves a restriction.

The rules being promulgated today are nationally applicable, and this action is based upon a determination of nationwide scope and effect. Under Section 307(b)(1) of the Clean Air Act, judicial review may only be sought in the United States Circuit Court of Appeals for the District of Columbia Circuit. Petitions for judicial review must be filed on or before December 14, 1981.

(Secs. 110(a)(2)(I), 172(b)(6), 173, 301(a) of the Clean Air Act, as amended, (42 U.S.C. 7410(a)(2)(I), 7502(b)(6), 7503, 7601(a); sec. 129(a)(1) of the Clean Air Act Amendments of 1977. Pub. L. No. 95–95. 91 Stat. 685 (August 7, 1977))

Dated: October 3, 1981.

Anne M. Gorsuch.

Administrator.

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

Appendix S [Amended]

1. Section II. Subsection A of the Emissions Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979), 45 FR 31307 (May 13, 1980), 45 FR 52741 (August 7, 1980), and 45 FR 59879 (September 11, 1980) is amended as follows:

a. By changing the words "Building; structure or facility" at the beginning of paragraph 2 to read "Building, structure, facility or installation";

b. By removing paragraph 3 and renumbering the succeeding paragraphs accordingly; and

c. By removing paragraphs 9 and 10 and renumbering the succeeding paragraphs accordingly.

§ 51.18 [Amended]

2. Section 40 CFR 51.18(j)(1) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (j)(1)(ii) to read "Building, structure, facility or installation";

b. By removing paragraph (j)(1)(iii) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (j)(1)(ix) and (x) and renumbering the succeeding subparagraphs accordingly.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

§ 52.24 [Amended]

3. Section 40 CFR 52.24 (f) is amended as follows:

a. By changing the words "Building, structure or facility" at the beginning of paragraph (f)(2) and to read "Building, Structure, facility or installation";

b. By removing paragraph (f)(3) and renumbering the succeeding subparagraphs accordingly; and

c. By removing paragraphs (f)(9) and (10) and renumbering the succeeding subparagraphs accordingly.

[FR Doc. 81-29706 Filed 10-13-81; 8:45 am]

C. Designated Comments From Administrative Rulemaking Record:

1. Comments of Louisiana-Pacific Corporation (March 26, 1981)

March 26, 1981

Environmental Protection Agency
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, N.C. 27711

Attn: Mr. Michael Trutna

Dear Mr. Trutna:

We have carefully reviewed the Federal Register, Vol. 46, No. 48, Thursday, March 12, 1981, page 16280 thru 16282.

We are very pleased to see a clear definition of "source" as it pertains to a non-attainment area, as well as dropping the current requirement regarding "reconstruction."

It will, in our case permit the construction of a 330,000 lb. per hour waste fuel boiler complete with electrostatic precipitator and SO_2 scrubber to replace two oil fired boilers with no pollution devices.

It will also permit the construction of a 700 ton/day kraft chemical recovery boiler of the latest "low odor" design replacing two older "direct contact" chemical recovery furnaces.

In addition it will reduce our dependance on buying 200,000 lbs./hr. of steam from oil-fired public utility boiler close by. The total investment of approximately $40,000,000 will greatly reduce the air pollution from the plant ("source") and save 500,000 barrels per year of imported oil.

Not only do we strongly support this change, but see it, hopefully, as a more balanced view of pollution vs. our country's economic well-being.

Sincerely,

M. B. Mountain
General Manager
Container Products Division

2. Comments of Regional Air Pollution Control Agency Serving Clark, Darke, Greene, Miami, Montgomery and Preble Counties (Ohio) (March 27, 1981)

March 27, 1981

Mr. Michael Trutna
Standards Implementation Branch MD-15
OAQPS
Research Triangle Park, N.C. 27711

Dear Michael:

This letter is written in response to the March 12th Federal Register proposed rules concerning the redefinition of "source" for nonattainment areas, and the removal of the "reconstruction" requirements. The Regional Air Pollution Control Agency (RAPCA) wishes to express its support for this action. We feel that the change will provide consistency and will allow more local agency responsibility in the new source review process.

We have for some time felt that our local review of new sources is sufficient to assure new source compatibility with the attainment strategy for the Dayton Area. We will continue to review and permit individual equipment installations under the Ohio EPA permit to install regulation which requires the installation of best available technology on all new sources, regardless of size. Federal review of new source installations in the Dayton Area in past years has proven to be redundant, time consuming, confusing, and often times, many months after the new source has been permitted and installed. To the extent that this proposal removes such redundancy, we are supportive. We have in the past sought assistance from both the regional office and that in RTP for advice on complex sources. We shall continue this practice in the future. We believe strongly that the proper role for the federal EPA in

the new source review process is one of advice and assistance.

Again, we support the proposed changes and thank you for this opportunity to comment.

Sincerely,

John A. Paul/for
William T. Burkhart,
Supervisor
JAP/vmt
cc: Charles Taylor, Chief
OAPC, Ohio EPA

3. Comments of Commonwealth of Pennsylvania Department of Environmental Resources (April 3, 1981)

April 3, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning
and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

This is in response to the proposed revisions to the definition of source as it applies to nonattainment areas which was published on March 12, 1981 (46 FR 16280–16282).

I am concerned that the proposed change may needlessly increase emissions in areas violating the primary National Ambient Air Quality Standards (NAAQS) and jeopardize the ability to these areas to attain the NAAQS. In addition, I am concerned because the proposed change may not be consistent with the statutory requirements of the Clean Air Act.

The air quality needs of areas violating the health related NAAQS are different from those in Prevention of Significant Deterioration (PSD) areas. In nonattainment areas, there is a need to reduce emissions; while, in PSD areas the emphasis is on limiting increases in emissions. Making the nonattainment definition of source identical to that used in PSD areas will make it more difficult to obtain the emission reductions necessary to assure attainment of the NAAQS. The reasons for this are discussed below.

The PSD program definition of "significant" exempts from the new source review increases in emissions up to 40,

25 and 40 tons per year for sulfur dioxide (SO_2), total suspended particulates (TSP) and volatile organic compounds (VOC) sources, respectively. Although these levels of emissions may be "insignificant" in areas attaining standards, this is not the case in many nonattainment areas. In most TSP and VOC nonattainment areas and some eastern SO_2 nonattainment areas, the violations of the NAAQS result from the cumulative impact of all sources in the nonattainment area. Allowing even the PSD significance level increases from new and modified sources would further burden already overburdened atmospheres and require corresponding reductions from existing sources.

Further the proposed redefinition would exempt some sources from the nonattainment area control technology requirements (RACT and LAER) based on the rationale that the New Source Performance Standards (NSPS) would assure use of the most up-to-date pollution control technology. This rationale is flawed because NSPS have not been promulgated for a large number of major air pollution sources (for example, coke ovens, industrial boilers and numerous VOC source categories). Additionally, the proposed redefinition is structured so that the exempt sources would not even be subject to the reasonably available control technology (RACT) requirement of Section 172(b)(2) of the Clean Air Act.

Exempting sources from the control technology requirements and permitting PSD emission increases while attempting to solely rely on the reasonable further progress (RFP) provision (as suggested in the Federal Register) as the measure of success of the Part D plans may be inadequate to assure attainment and short-sighted. The current Part D State Implementation Plan control strategies are based, in many cases, on rudimentary emission—air quality relationships (ozone) and plans for further study of the nonattainment problem (TSP). As a result, there is considerable uncertainty regarding the

adequacy of the amount of emission reductions necessary to achieve the health related standards. This ambiguity makes the Part D RFP plans in many cases tenuous at best. In addition, the RFP demonstrations are an "after-the-fact" evaluation of progress. In most cases, they are based on emission inventories that lag by three years or more. Because of this time lag, numerous new and reconstructed sources may be built with lenient or no control before it is realized that the Part D plans may not be adequate to attain the NAAQS. Ultimately, this may result in the costly retrofitting of better controls on those new and reconstructed sources exempt from the new source review.

In addition to the above requirements, it should be remembered that the National Commission on Air Quality projected that 11 areas of the country were certain to miss the 1987 deadline for attainment of the ozone standard, 18 areas probably would not attain the TSP standard by 1982, and 4 areas are projected not to attain the SO_2 standard by 1982 "because they are relying on unrealistic control measures or . . . improvements in air quality are slower than projected." These failures to meet the health related NAAQS are predicted to occur in some of the largest and most densely populated areas of the country. Relaxing the requirements for new construction in these areas would further jeopardize public health and make it more difficult to attain these standards in the future.

Regarding the statutory requirements of the Clean Air Act, the EPA currently uses a definition of source, as it applies in nonattainment areas, which recognizes that all major new, modified and reconstructed sources (equipment) should be subject to the new source review requirements even if the new emissions are offset by emission reductions from other equipment at the same plant. The proposed redefinition would limit the new source review to only those situations where plantwide emissions increases exceed the PSD significance levels.

Although the Federal Register proposal states that EPA feels it has substantial discretion to redefine source, it appears to me that EPA's discretion as it applies in nonattainment areas is clearly limited. Senator Muskie, during his presentation to the Senate of the Clean Air Act Amendments of 1977, stated that "The conference bill ratifies EPA's 'emission offset' interpretative regulation, published in the December 21, 1976 Federal Register at pages 55524–30" (see 123 Congressional Record, column 1, daily edition, August 4, 1977, statement of Senator Muskie). This clearly links the attainment provision of the Clean Air Act Amendments of 1977 to EPA's definition of source as it existed in 1976. (The definition of source as used in the December 21, 1976 regulation and as subsequently modified refers to identifiable pieces of equipment as well as entire plants.)

Further in his presentation Senator Muskie stated: "Thus, a new source is still subject to such requirements as 'lowest achievement (SIC) emission rate' even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.

"A source . . . is subject to all the nonattainment requirements as a modified source if it makes *any physical change which increase the amount of air pollutant for which the standards in the area are exceeded.*" (emphasis added.) (See 123 Congressional Record 13702, column 2, daily edition, August 4, 1977, statement of Senator Muskie.)

Thus, when the Part D requirements of the Clean Air Act and Senator Muskie's presentation are considered together it clearly indicates the intent of Congress to require that all major new construction in a nonattainment area be subject to the new source review requirements of Section 173 of the Clean Air Act. This effectively limits EPA's discretion on the definition of source.

In addition to these directions on the applicability of the new source requirements to individual pieces of equipment in nonattainment areas, Congress directed that no emission increases be permitted from the construction of new or modified major sources (equipment). Section 173 of the Act provides:

". . . that permits to construct and operate may be issued if—

(1) . . .

(A) . . . emissions in the region . . . will be "*sufficiently less* than total allowable emissions . . . prior to the application . . ." (emphasis added).

This point was also stressed by Senator Muskie during his presentation when he stated that new and modified sources would only be allowed:

". . . when *more-than-offsetting emission reductions* are secured prior to the new facilities startup date . . ." (emphasis added) (Congressional Record 13702).

EPA's proposed redefinition of sources would not be consistent with this provision since it would allow emission increases of 40, 25 and 40 tons per year for SO_2, TSP and VOC sources, respectively.

Another area where the proposed redefinition of source would not be consistent with the statutory requirements of the Clean Air Act is Section 172 which requires the implementation of all reasonably available control measures on existing sources and attainment of the health related standards "as expeditiously as practicable". Since the proposed redefinition of source would eliminate all new source review requirements, there would be no legal basis for imposing the reasonably available control requirements of Sections 172(b)(2) and (3). As a result, new sources eligible for the exemption would be permitted to start operation with little or no controls. Those sources not

eligible would be required to install the most stringent levels of control and existing sources would be required to install RACT levels of control. Certainly Congress did not intend this disparity in these critical air quality areas. Nor did Congress intend that achievement of the health related standards be delayed because new or modified sources were inadequately controlled.

One of EPA's stated purposes in proposing to exempt construction from new source review and RACT requirements is to reduce unnecessary regulatory burdens, thus, creating a better climate for new investment and plant modernization in nonattainment areas. However, because of the potential for legal challenges, EPA proposed action would do the opposite of its intended purpose. Legal challenges would create considerable uncertainty and be a disincentive to new investment and modernization in nonattainment areas. Further, it may result in the need to retrofit controls that would be more costly than if the equipment were originally constructed with the proper controls.

In closing, I would like to reemphasize that it is my belief that the proposed change may jeopardize progress towards attainment of the NAAQS and may not be consistent with the Clean Air Act requirements. Therefore, I strongly encourage the EPA to not pursue a redefinition of source that would allow increases in emissions and exemptions from control technology requirements.

If you have any questions concerning these comments, please contact me.

Sincerely,

JAMES K. HAMBRIGHT,
Director
Bureau of Air Quality Control

4. Comments of New York State Department of Environmental Conservation (April 6, 1981)

April 6, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning & Standards
Research Triangle Park, North Carolina 27711

Dear Mr. Trutna:

The Department of Environmental Conservation supports the redefinition of "source" in nonattainment areas proposed in the Federal Register, Vol. 46, No. 48, pages 16280–16282.

This is the first sign of positive action regarding the Prevention of Significant Deterioration/Emission Offset Policy question in a long time. All the arguments presented in favor of changing the definition of "source" in a nonattainment area to be compatible with the definition in an attainment area are valid. I can think of no arguments in opposition. There will be those who complain that this removes "technology forcing" requirements but this contention is fallacious. The main outcome of requiring individual review of each new piece of equipment at a plant in a nonattainment area was to preclude any modernization. No flexibility was permitted a source owner in selecting options. In many cases, it was simpler and cheaper to operate old, more polluting sources than to trade up. With an unapproved SIP, there were no options.

The previous definition requiring individual review of any new unit would be fine if there were an infinite amount of investment capital available and an incentive for scrapping existing equipment. Since this is not the case, all which was accomplished was to encourage use of outdated equipment

beyond the point where it would have otherwise been replaced by newer, cleaner, more efficient units.

The new definition will have both short- and long-term benefits in terms of air quality.

Sincerely,

Harry H. Hovey, Jr., P.E.
Director
Division of Air

5. Comments of Missouri Department of Natural Resources (April 8, 1981)

April 8, 1981

Mr. Michael Trutna
U.S. Environmental Protection Agency
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

This letter is in response to the solicitation of public comments on the proposed rule published in the Federal Register on March 12, 1981 (46FR16280) pertaining to the revision of the term "source."

The Missouri Air Pollution Control program supports this proposed rule change. We hope there will be other such changes in the near future which will tend to standardize the definitions of various terms as used in the EPA regulations published over the past ten years.

Sincerely,

John W. Haasis
Staff Director
Air Pollution Control Program

JWH:RJC:bw

6. Comments of Crown Zellerbach (April 8, 1981)

April 8, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

We applaud the proposed change in the definition of "source" contained in the rules governing new source review in nonattainment areas so as to make the definition the same for PSD areas (FR Vol. 46, No. 48, page 16280). We believe the change will result in increased industrial capacity with no increase in air pollutants. In fact, some of the projects that we are considering will result in a decrease in nonattainment pollutants that would not have occurred without this rule change.

For example, at the present time it is not possible to add a flexographic printing press without the use of very expensive and energy consuming add-on equipment designed to meet LAER. In many plants, low solvent technology plans have been approved which may take five years to implement. Now it will be possible to reduce emissions from some or all of the presses in the plant to allow the installation of a new press. In general, new equipment is designed to use less solvent than older units. The new press, because of its higher productivity, will be operated at maximum operating hours resulting in a decrease in the total plant emissions.

The elimination of a reconstruction requiring LAER in a nonattainment area will eliminate the possibility that an involuntary reconstruction, due to an accident, could result

in a plant closure if offsets greater than 1.0 required to rebuild the source were not available.

Elimination of the confusion about the definition of a source should help simplify the rules for new source review. Many states had attempted to write a new source review regulation for both attainment and non-attainment areas.

Very truly yours,

James E. Walther/lg
Supervisor,
Air and Noise Programs

cc:
Dr. H. R. Amberg—ESD

7. Comments of American Textile Manufacturers Institute, Inc. (April 9, 1981)

April 9, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

RE: Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans. 40 CFR Parts 51 and 52. Proposed Rules FR Vol. 46 No. 48 Page 16280

Dear Mr. Trutna:

The American Textile Manufacturers Institute, Inc., is the central trade association for the textile industry. It represents organizations engaged in the manufacturing and finishing of all textile fibers with approximately 200 corporate members located in over 30 states. The Institute has reviewed the Environmental Protection Agency's proposed rules and offers the following comments.

We believe the proposal is a positive example of the type of regulatory relief that can be provided by this Administration without sacrificing either public health or welfare.

Modifying the definition of source for nonattainment areas to be an entire plant will provide greater flexibility in implementing pollution controls. The existing definition of "source" has prohibited the construction and operation of new facilities which could reduce the total amount of pollution being emitted. For example, we are aware of a

facility in the industry which has been prohibited from operating a new fabric coating line because a construction moratorium is in effect, even though the new coating line will result in a net decrease in emissions of approximately 90.5 tons per year. Obviously, this is not the intent of the Clean Air Act.

The amendments, however, do not address the requirement that net decreases be federally enforceable. In an area such as Rhode Island, where EPA has not approved the State Implementation Plan and has also not promulgated any such regulations of its own for the State, this requirement cannot be met. We recommend that it be amended to allow net decreases that are state enforceable.

Second, existing facilities which received a state permit to construct but were not eligible for a federal permit because of a construction moratorium should be grandfathered as long as no increase in emissions at the plant resulted.

We appreciate the opportunity to provide these comments and commend the Agency for their action.

Sincerely,

Maggie Dean
Technical Director
Environmental Affairs

MD/br

8. Comments of Congressman George Miller, 7th District, California (April 10, 1981)

April 10, 1981

Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Environmental Protectien Agency
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

I am writing to comment on the proposed rules that were printed in the *Federal Register* on Thursday, March 12, 1981, pages 16280 through 16282. These proposed rules would make a change in the Clean Air Act definition of a "source" of pollution. I strongly endorse this proposal, and urge the Environmental Protection Agency to make these rules final at the earliest possible date.

I have been very involved in the last nine months with a paper plant in my congressional district that is planning to install two new wood-fueled boilers. These boilers would replace two old oil-fueled boilers, resulting in less pollution, a substantial reduction in oil consumption and a stronger financial picture for the company. This company was prevented from building these new boilers because of the definition of "source" during the imposition of a construction moratorium, as we now have in California.

The lack of administrative discretion in this area prompted me to introduce legislation that would remedy this situation. Your proposed rule change would be helpful and I am pleased to lend it my support.

Thank you for the opportunity to comment on this important issue.

Sincerely.

George Miller
Member of Congress, 7th District
GM/rae

9. Comments of Arizona Department of Health Services (April 10, 1981)

April 10, 1981

Mr. Michael Trutna
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

Dear Mr. Trutna:

Re: Proposed Rules Published at 46 FR 16280, March 12, 1981, which are proposed to amend the PSD/new source review rules published at 45 FR 52676, August 7, 1980.

The State of Arizona wishes to be placed on record as strongly supporting these proposed rule amendments.

This is particularly so in the case of the proposal to redefine "Source" so that it will have the same definition and concept in a nonattainment area as it does in an attainment area. As pointed out in Arizona's comments on the originally proposed rules, submitted to Docket No. A-79-35 on February 28, 1980, in a state such as Arizona, where there are only two urban nonattainment areas and the primary cause of both is the automobile, no strategy applied to any stationary source would make any significant difference. The rule as published on August 7, 1980, would have had no substantial effect upon attainment status, would have operated to deprive the State of its latitude in choosing implementation strategy for Section 173 of the Act that would best fit local conditions, and would therefore have definitely been "excessively and unnecessarily burdensome." In addition, although we have no specific examples to support the conclusion, there seems to be little doubt that, as you point out, the August 7 definition could and would act as a disincentive to new investment and modernization by discouraging modifications to existing facilities.

The State of Arizona also concurs with and supports the proposal to eliminate the "reconstruction" test for new source review in nonattainment areas, particularly in the light of the redefinition of "source." We believe that adequate rules already exist, requiring review of new major sources "or alteration," to meet the requirements of the Act, on a case-by-case basis, without the additional complications generated by the "reconstruction" requirement.

The State of Arizona appreciates the opportunity to comment on these progressive and forward-looking proposals.

Sincerely,

Ronald L. Miller, Ph.D.
Acting Assistant Director
Environmental Health Services

RLM:DEM:ms

10. Comments of Ohio EPA (April 10, 1981)

April 10, 1981

Mr. Michael Trutna
Standards Implementation
Branch (MD-15)
Office of Air Quality Planning
& Standards
Research Triangle Park, NC 27711

Dear Mr. Trutna:

This letter is written to comment on the March 12, 1981 *Federal Register* in which the definition of "source" in nonattainment area is proposed to be modified. We are supportive of the proposed revision to the federal definition. It will more readily allow new source development in the major urban areas.

On the state level, we will continue to require the installation of Best Available Technology on all new sources, regardless of location. We believe new sources should be equipped with the latest cost-effective control measures. By continually installing cleaner new sources to replace older sources, we can improve air quality.

Thank you for this opportunity to comment on these proposed changes.

Sincerely,

James F. McAvoy
Director

JFM:tln
42000.0

11. Comments of State of Maryland Department of Health and Mental Hygiene Office of Environmental Programs (excerpted) (April 13, 1981)

April 13, 1981

Mr. Michael Trutna
Standards Implementation Branch
(MD-15)
Office of Air Quality Planning
and Standards
Research Triangle Park, N.C. 27711

Dear Mr. Trutna:

EPA published in the Federal Register its proposal to modify the definition of source as it would apply to non-attainment areas so that the definition would be identical to the definition of source applicable to the PSD program as modified August 7, 1980. EPA has indicated in its proposal that the intent is to define source as a "plant", and that this definition would reduce the activity within each of these programs and also minimize the moratorium under Section 110 of the Act which applies in nonattainment areas within states lacking an approved SIP. Maryland is in agreement with the concept of this proposal in that it is desirable to maintain consistency within similar programs. We also agree, generally, that there is little benefit in embarking on a new source review of any type if there is no impact on the ambient air. However, we believe that there are other considerations to be made prior to approving these changes. Our comments on the proposed definition change are as follows:

* * *

Another problem is that we believe EPA has misinterpreted the purpose of §173 of the Act. We believe Congress spoke clearly when it called for LAER and RFP in a State operated offset-type SIP. EPA has not attempted to show that a mistake was made by Congress in its preamble to the proposed rule. It would appear to us that by the obvious nature of the language, more was required of a new source than just a one-

for-one offset. We conclude that technology for its own sake was intended for new sources in non-attainment areas just as Congress intended for the NSPS source. Hence, the reasoning for retaining the reconstruction definition for NSPS purposes is the same for saving it for non-attainment area purposes.

In conclusion, although we believe that there is a need at times to maintain consistency within the many parts of the air program, we believe that there should be a significant difference in reviewing a new, modified or reconstructed source in a PSD area as compared to an area which exceeds health related standards. In the non-attainment area, the States are having great difficulties finding ways to reduce emissions sufficiently to demonstrate achievement of many National Ambient Air Quality Standards. It appears as if your proposed amendment will further aggravate this problem and we, therefore, suggest strongly that you abandon the proposal.

Sincerely yours,

George P. Ferreri, Acting Director
Air Management Administration

12. Comments of Natural Resources Defense Council, Inc. (April 13, 1981)

Comments on the
Proposed Change in the Definition of
"Source" in Nonattainment Areas
and the
Proposed Deletion of the "Reconstruction"
Rule in Nonattainment Areas
46 Fed. Reg. 16280 (March 12, 1981)

Prepared by
David D. Doniger

April 13, 1981

The Natural Resources Defense Council submits these comments in opposition to two proposals issued March 12, 1981, which would seriously weaken the federal and state programs for meeting the minimum standards for healthful air in heavily polluted areas of the country.

EPA first proposes to redefine what constitutes a "source" in nonattainment areas in a way that would seriously delay attainment of the health standards. EPA currently defines "source" as both an entire plant and as the major pollution-emitting components within it. Whenever a new component is added or an existing one modified to produce a major increase in emissions, three stringent conditions must be met: use of the best technology, net reduction in the area's emissions, and compliance with pollution limits by all commonly-controlled sources. The Agency now proposes to define a "source" as an entire plant only. This would allow major new or modified components to escape these conditions so long as total plant emissions do not increase in major amounts. Instead of promoting attainment, most growth merely would keep area-wide emissions constant at best. This definition of "source" is inconsistent with the purposes of the nonattainment program of the Clean Air Act and therefore is unlawful.

EPA also proposes to abandon the "reconstruction" rule, which treats rebuilding an existing source as construction of a new one if more than half its capital value after rebuilding represents new investment. This rule is necessary to prevent sources from escaping the conditions on growth in nonattainment areas by continual piecemeal refurbishment. To allow such permanent evasion of the Act's requirements for use of the best technology and the other conditions on growth would be contrary to the Act's goal of rapidly meeting the health standards. Thus this proposal is also unlawful.

The proposals also fail to meet procedural requirements of the Clean Air Act. The support for the factual premises of a rule must be set forth at the time a rule is proposed, so that the public may have the opportunity to scrutinize and comment on the evidence. Here EPA has asserted several reasons for changing these rules which are questions of fact, yet the Agency has made available no factual support for its assertions. The factual, support, if any exists, must be made available for comment before these proposals may go any further.

If these proposals were promulgated, serious delays in meeting the federal health standards would occur. Attainment could be set back many years in some areas. This would substantially injure thousands of NRDC's members and millions of other Americans who live in nonattainment areas and whose health is threatened by air pollution there.

In light of their substantive and procedueral defects, these proposals must be withdrawn.

I. The Proposed Redefinition of "Source"

The nonattainment provisions of the Clean Air Act establish a demanding program of pollution control for the areas of the country that still fail to meet the primary air quality standards, set at the levels needed to protect public health. The standards must be met "as expeditiously as practicable," but no later than 1982 (1987 for carbon monoxide and ozone), and "rea-

sonable further progress" towards the standards must occur in the intervening years. Sections 171, 172.

Because the health of people living in nonattainment areas is endangered, the Act subjects pollution sources there to more stringent emission control requirements than sources located elsewhere. New or modified sources which would emit at least 100 tons per year of a criteria pollutant must receive a permit before construction (a process known as "new source review"). The permit may be granted only if the source meets three conditions designed to assure that new growth actually contributes to, rather than hinders, attainment of the health standards:

(1) the proposed source must meet the "lowest achievable emission rate" (LAER),
(2) the owner or operator must obtain a net reduction in the area's emissions sufficient to amount to "reasonable further progress" (usually through a greater-than-even emissions "offset"), and
(3) All other sources in the area under common control must be in compliance with state and federal emission limits.

Section 173.[1]

Recognizing the intention of Congress to make growth contribute to attainment rather than hinder it, EPA regulations to this time have always defined "sources" subject to new source review to include the separate process units or pieces of pollution-emitting equipment within large industrial plants, as well as the entire plants themselves. Under these rules, every new or modified process unit or piece of equipment that itself may emit 100 tons per year is subject to new source

[1] In addition, a fourth condition is that after July 1, 1979, an area where a new or modified source is proposed must have an adequate implementation plan approved by EPA before a permit may be issued. Section 110.

review and the pollution-reducing conditions summarized above.

EPA now proposed to change course dramatically. EPA proposes to redefine "source" in nonattainment areas as solely the whole plant. As redefined, so long as offsetting reductions were made elsewhere in the plant that simply kept the whole plant's emissions from increasing by 100 tons, new or modified components of the plant would escape the requirements of LAER, net emission reductions, and compliance by other commonly controlled sources, no matter how much the components themselves emitted.

Redefining "source" only as entire plants for the nonattainment program would be unlawful. The cases reviewing prior attempts to do so under other programs of the Clean Air Act have established that EPA may not give the term "source" a meaning that is inconsistent with the purposes of the program concerned. *Alabama Power Co.* v. *Costle*, 13 ERC 1993, 2039 (D.C. Cir. 1979); *ASARCO* v. *EPA*, 11 ERC 1129, 1135-36 (D.C. Cir. 1978). Defining a "source" as an entire plant would not be consistent with the purposes of either the new source review provisions or the nonattainment program as a whole, because it would substantially impede the attainment of the health standards in these areas.

When a nonattainment area will meet the health standards depends heavily on the reach of new source review. If substantial growth were allowed to occur without making the maximum feasible emission reductions as required by LAER, without net emission reductions sufficient for "reasonable further progress," and without compliance by other sources under common control, then attainment would be substantially delayed. In fact, sources could be routinely constructed or modified *adding* up to 100 tons per year to a nonattainment area's pollution burden. With new emissions poorly controlled and one spur to compliance with existing limits by other sources removed, even greater reductions would be necessary from existing sources, at greater difficulty, cost, and delay. The reductions available from existing sources are not unlim-

ited. Many areas that now will meet the standards by the deadlines would fail. Even areas that now are not anticipated to meet the deadlines would fall further behind. The setback to attainment of the health standards would mean greater health risk and more illnesses and premature deaths among the population of the nonattainment areas. This would be completely contrary to the purposes of the nonattainment program and EPA therefore may not adopt this definition.

The purpose of the nonattainment program is not to hold emissions constant. It is certainly not to sanction steady increases in pollution in 100 ton increments as a result of continued growth. The purpose of this program is to *reduce* pollution in order to achieve the primary standards for protection of health as expeditiously as practicable. According to the House Report on the 1977 amendments, the nonattainment program, including the stringent new source review rules, is intended "as a means of assuring the dual goals of attaining air quality standards and providing for new economic growth," and "to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date."[2] Of the LAER reqirement in particular, the Report stated:

> [M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth. This is particularly true in light of the requirement for reasonable further progress. . . . Finally, the technology-forcing purpose of the Act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas.[3]

It is simply incompatible with these legislative purposes for EPA to adopt a definition of "source" which shields a substantial portion of new investment in nonattainment areas from the requirements for use of the best pollution controls and for achievement of progress toward the standards.

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[2] H.R. Rep. No. 294, 95th Cong., 1st Sess. 13, 211 (1977)
[3] *Id* at 215.

In *ASARCO*, the court held that defining "sources" only as entire plants conflicted with the purposes of new source performance standards (NSPS's). The court stated that NSPS's "are designed to *enhance* air quality" by making all new and modified sources use advanced control technology. Defining sources only as entire plants, however, "postpones the time when the best technology must be employed and *at best* maintains the present level of emissions." The court continued:

> Treating whole plants as single sources would grant the operators of existing plants permanent easements against federal new source standards—and the worst polluters would get the largest easements. The "best" pollution control technology would never have to be installed, and existing plants would use up much of the available clean air, inhibiting construction of new plants. . . .

This, the court concluded, was "contrary to . . . the basic purpose of the Act." 11 ERC 1135–36, 1137 n. 40. (emphasis added).

These conclusions apply with even greater force to the nonattainment program, which calls for even more effective control technology that the NSPS program (LAER), creates additional offset and compliance requirements, and even more than the NSPS program is intended to improve air quality. As the 1977 Senate Report stated:

> The need for procedures to assess air quality impacts and limit introduction of new facilities is most acute where such facilities will prevent attainment or maintenance of a national air quality standard.[4]

For the prevention of significant deterioration (PSD) program, EPA regulations currently define "sources" as entire plants. The proposal here under review claims that having different definitions of "source" for different programs is an inconsistency. But in *Alabama Power*, the court upheld the

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[4] S. Rep. No. 127, 95th Cong., 1st Sess. 56 (1977).

current PSD definition precisely because the purpose of the PSD program is different from that common to the NSPS and nonattainment programs. PSD's purpose is *not* improving air quality. It is *protecting* existing air quality, where air is still clean. PSD even explicitly permits a limited decline in existing air quality in clean air areas. Because of the difference in program purposes, *Alabama Power* both distinguished and reaffirmed *ASARCO's* rejection of the whole-plant definition. *See* 13 ERC 2040, 2044. Thus *Alabama Power*, as well as *ASARCO*, clearly indicates that the whole-plant definition proposed for the nonattainment program would be unlawful.[5]

None of the seven "reasons" EPA offers at 46 Fed. Reg. 16281 in fact supports the proposed change. We consider them in turn.

Reason 1: Application of the construction permit restrictions. EPA notes that some areas which still have not submitted approvable SIP's are subject to permit restrictions. The Agency then implies that no purpose is served by barring

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[5] The proposed redefinition also conflicts with the definition of "source" understood and intended by Congress when it adopted the nonattainment provisions. In section 129(a) of the 1977 amendments (continuing until mid-1979 the EPA "interpretative ruling" allowing continued growth after the original 1975 deadline for attainment) Congress made explicit reference to the then-existent EPA policy on growth. That policy was premised on defining "sources" as the components of a plant as well as the entire plant.

Section 129(a) does permit EPA to modify the interpretive ruling. However, the purpose of Section 129 was to place more stringent pollution-reducing conditions on growth in nonattainment areas after mid-1979 than existed under EPA's interpretive ruling to that point. Modifications of the ruling by redefining "source" as an entire plant would have substantially weakened those conditions rather than strenghtened them, and thus would have been unlawful. Modifying the definition of "source" in this manner now also would make the requirements of Part D weaker than those adopted by Congress in 1979 in Section 129. Therefore, the proposed redefinition would be fundamentally inconsistent with the understanding and purposes of Congress in 1977.

construction which would produce "no increase" in pollution. (It bears noting that this statement is incorrect; increases up to 100 tons per year could occur.) The construction restrictions are simply an incentive Congress has chosen to encourage states to develop approvable plans. Removing some sources from the reach of the restrictions would only weaken the effectiveness of the incentive and delay further the development of approvable plans.[6] The blame for the application of the restrictions to "no increase" construction lies not with the definition of "source" but with whatever shortcoming in the SIP's precludes approval. Adopting a "source" definition that is fundamentally inconsistent with the purposes of the program is a completely inappropriate remedy.

Reason 2: Alleged disincentive to new investment and modernization. The proposal claims that the application of new source review to components of plants discourages new investment and modernization. No data has been offered to support the claim that this effect is significant or exists at all. EPA's assertion is merely speculation.

The marginal cost of building plant components in compliance with the LAER, offset, and enforcement requirements of the nonattainment program (over and above the cost of meeting the NSPS for such components) is small when compared to the total cost of new construction or modernization. Thus it is likely any disincentive to new construction is small.

If any data does exist which EPA believes shows a significant effect, the Agency has committed a serious procedural error by not making it available for public review and comment. Section 307(d)(3) of the Clean Air Act requires EPA to make available, when a rule is proposed:

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[6] Indeed, the construction restrictions are intended to bar precisely this type of construction. See Section 129(a) of the 1977 amendments, discussed in the previous note.

(A) the factual data on which the proposed rule is based; [and]
(B) the methodology used in obtaining the data and analyzing the data. . . .

EPA will have to make any such data available to the public and allow a new period for comment before promulgating these rules.

Even if such a disincentive were demonstrated, it would provide no basis for excluding a substantial portion of investment and modernization from the Clean Air Act's requirements for protection of health. Congress explicitly recognized that the nonattainment program is a compromise reconciling the need for continued growth and the need for continued emission reductions. The prior statute, before the 1977 amendments, allowed no growth at all in nonattainment areas. Congress explicitly determined to accept the marginal cost of the nonattainment requirements in order to speed attainment of the health standards.

Reason 3: Alleged retarding of pollution control progress. The claim that the proposed change in the definition of "source" would spur pollution control progress is vastly overstated. Only in the few instances where the new or modified plant emitted *less* than the prior plant would there be any "progress in air pollution control." More often the whole-plant approach would let emissions stay constant at best and often would allow emission to increase. *Any* growth that occurs under the current definition of "source" leads to progress towards the health standards. Very little growth that would occur under the proposed definition would lead to progress.

Reason 4: Alleged confusion and inconsistency. There is no inconsistency between the different definitions of "source" under the nonattainment purposes that require different "source" definitions.

As for confusion, any industry contemplating construction or modification of a source, and any state or federal agency involved in the implementation of the Clean Air Act, certainly has at its command the minimal legal assistance needed to

understand this aspect of the programs and the reasons for their differences.

Reason 5: Alleged non-interference with the nonattainment program's fundamental purpose. We have already shown that releasing a substantial fraction of new investment in a nonattainment area from the pollution-reducing conditions of the nonattainment program would substantially slow the attainment of the health standards. Poor control of new sources (due to failure to meet LAER) means that more emission reductions must be found from existing sources. There are practical limits on the reductions available from existing sources. The greater reductions needed for attainment would come only at substantially greater difficulty, cost, and delay.

Reason 6: Claim that NSPS represents "the most up-do-date" controls. The NSPS's by definition are not "the most up-to-date" pollution control techniques. They are a minimum requirement for new sources and nearly always allow more pollution than the best plants already in operation. Relatively heavy weight is given to cost considerations. Often, NSPS's are old and fail to reflect subsequent improvements in control technology since put into practice.[7]

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[7] See the findings of the Report of the National Commission on Air Quality at page 2.1-64 (March 1981):

291. New source performance standards adopted by EPA generally require the use of good controls, but, because of energy, economic, and other environmental considerations, the standards often do not require technology that would achieve the lowest possible emission levels. The consideration of such other factors by EPA is required under Section 111. In some cases, EPA does not require the maximum level of control because of the way in which the controls would affect manufacturing processes (See p. 3.7-2, 7).

292. In many cases, new sources can reduce emissions more than is required by existing new source performance standards not only because maximum control levels usually are not required when the standards are adopted but also because new control

Congress created the LAER requirement precisely to make new and modified sources in nonattainment areas use technology better than NSPS's. The NSPS is the most lenient level at which LAER may be set. LAER is defined as pollution control as good as that used at the best existing plant anywhere in the world, or the greatest level of control required by any state, whichever is more stringent. As the House Report indicated, costs are to have less weight in LAER determinations than in NSPS's, because the public health is at stake in nonattainment areas.[8]

Furthermore, as the proposal admits, there are no NSPS's for many source types. The case-by-case LAER review is essential to requiring some consideration of what constitutes good technology for these sources.

For all these reasons, reliance on NSPS's is no substitute for the nonattainment program Congress established for the dirty areas.

Reason 7: Significant increases in entire-plant emissions will still be reviewed. The fact that construction or modification which adds more than 100 tons per year from an entire plant will still be subject to new source review is no justification for eliminating review of the many major new or modified components of plants. The purpose of the nonattainment program requires review of both whole-plant and component emission increases.

Because the proposed redefinition of "source" would conflict with the fundamental purposes of the nonattainment program

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technologies become available over time and because improvements in existing technology can be accomplished to achieve more control (See p. 3.7-2, 3).

293. Consideration of factors, such as costs, in some cases may indicate that more stringent controls should not be required even when increased control is technologically possible (See p. 3.7-2, 3).

[8] H.R. Rep. No. 294, 95th Cong., 1st Sess. 215 (1977).

it would be unlawful and may not be promulgated. The proposal must be rewritten.

II. The Proposed Deletion of the "Reconstruction" Definition

Current EPA regulations treat the rebuilding of an existing facility as construction of a new one where more than 50 percent of the source's capital value (after rebuilding) represents new investment. This "reconstruction" rule applies under both the NSPS and nonattainment programs.

The rule is necessary to keep sources from perpetually evading the requirements to meet LAER and the other pollution-reducing conditions on growth in nonattainment areas through continual piecemeal refurbishment of plants.

The two reasons EPA advances for abandoning this rule will not support this action. First, while EPA admits the reconstruction rule is appropriate for NSPS's, the Agency claims it is not needed under "a program of review basically designed to meet air quality standards." 46 Fed. Reg. at 16282. To the contrary, the reconstruction rule is *more* needed under the nonattainment program. The rule supports the purpose of the NSPS program, recognized in *ASARCO*, of improving air quality. That purpose is even stronger, as we have shown, in the nonattainment program. This "reason" therefore will not support abandoning the reconstruction rule.

Second, EPA contends the reconstruction rule is unneeded if "source" is redefined as an entire plant only. But that definition would be unlawful, as we have shown. Thus this reason also will not support the change.

Conclusion

For the foregoing reasons, neither proposed rule change would be lawful or reasoned. In addition, the rule change would be invalid insofar as it rests on factual premises whose support, if it exists, has not been disclosed for scrutiny and comment. NRDC requests the withdrawal of both proposals.

13. Comments of County of Erie, New York, Department of Environment and Planning (April 16, 1981)

April 16, 1981

Mr. Michael Trunta [sic]
Standards Implementation Branch (MD-15)
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711
Re: EPA Air Rules-40 CFR Parts 51 and 52
(Source Definition

Dear Mr. Trutna:

We fully support the proposal to provide a consistent definition of source for PSD and Non-Attainment purposes.

We have long felt that the current variation and definitions discriminated against the older communities in the Northeast.

The current definition has increased the difficulty in applying the trade-off and bubble concepts promoted by EPA. The proposed change will allow more creativity and innovative approaches to both meeting ambient monitoring standards and allowing economic development to occur.

We urge the earliest action on this revision.

Very truly yours,

Anthony T. Voell, P. E.
Deputy Commissioner

ATV:jk
cc: G. Kotas
M. Raab

14. Comments of State of California Air Resources Board (April 28, 1981)

April 28, 1981

Mr. Michael Trutna
Standards Implementation Branch
Office of Air Quality Planning
and Standards
Research Triangle Park
North Carolina 27711

Dear Mr. Trutna:

Subject: March 12, 1981 Proposed Changes to New Source Review Requirements.

This is in response to EPA's proposal to change the definition of "source" contained in the rules governing nonattainment area new source review rules to conform to that contained in the Prevention of Significant Deterioration (PSD) regulations. The California Air Resources Board is in general agreement with this proposal, since it is consistent with the policies most California air pollution officials have followed since 1976. EPA's proposal is also consistent with a new NSR/PSD rule which was developed jointly by the California Air Pollution Control Officers Association (CAPCOA) and the Air Resources Board. However, there may be some cases where the new definition will not be sufficient to meet commitments made in the 1979 Nonattainment Plans.

As we understand it, EPA is proposing to change its definition of "source" to one that is plant-wide, as opposed to the dual existing emission-point and plant-wide definitions. The intent of this action is to subject fewer sources to new source review, since only net emissions increases would be used to determine the applicability of NSR. The ARB agrees with this concept as a minimum

requirement, but believes that local jurisdictions should have the prerogative of using a more stringent approach. Many areas in California have identified the need for a more stringent NSR rule, and should not be prohibited from using the previous EPA policy. In some cases, an emissions reduction credit was claimed for NSR rules in the 1979 plans and approved by EPA. If EPA's changes were mandated on the states, the plant-wide definition of "source" could impair a region's ability to demonstrate Reasonable Further Progress by reducing the stringency of NSR rules.

In summary, we support this rule change because it provides more flexibility for industry, regulatory agencies, and local jurisdictions while meeting the goals of clean air. We trust that consistent with the new Administration's support for maximizing local control, EPA will allow state and local agencies the ability to adopt more stringent programs, should they wish to do so.

Please direct any further questions on this matter to Ron Friesen of my staff at (916) 322-6026.

Sincerely,

Gary Rubenstein
Deputy Executive Officer

D. Declarations Supporting Or Opposing Petitioners' Motion For A Stay And For Other Relief Pending Review:

1. Declaration of Robert S. Proctor In Opposition To Petitioners' Motion For A Stay And For Other Relief Pending Review (December 14, 1981)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
1725 I Street, N.W., Suite 600
Washington, D.C. 20006

CITIZENS FOR A BETTER ENVIRONMENT, INC.,
59 East Van Buren, Suite 1600
Chicago, Illinois 60605

and

NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
5650 West Central, Suite B
Toledo, Ohio 43615

Petitioners,

v.

ANNE M. GORSUCH,
ADMINISTRATOR,
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Respondent.

AMERICAN PETROLEUM INSTITUTE,
CHEVRON U.S.A. INC., et al.

Applicant-intervenors.

No. 81-2208

I, ROBERT S. PROCTOR, do hereby declare and testify as follows:

1. I am Vice President and General Manager, Manufacturing Department, of Chevron U.S.A. Inc. ("Chevron"), applicant-intervenor in the above-captioned litigation. In that capacity, I am responsible for the operation of all of Chevron's refineries, including the design and construction of capital improvements in those refineries.

2. At the present time, Chevron's sole manufacturing facility for high-viscosity-index ("high V.I.") lubricating oil base stocks, built in the late 1930's, is located in Richmond, California (the "Richmond Refinery"). These oil base stocks are blended at the Richmond Refinery and other locations to produce high V.I. lubricating oils used in industrial and vehicular engines. Because many available crudes are unsuitable for manufacture into high V.I. base oils at the Chevron Refinery and because of the declining operating reliability of the Richmond Refinery's existing lube oil plants, Chevron must purchase an increasing amount (now over half) of its base oil supply from other foreign and domestic suppliers. As the demand for high V.I. lube oils continues to increase, world manufacturers will have less lube base stocks available for purchase. Accordingly, Chevron forecasts that it will be increasingly difficult to meet future demand in the West Coast states—California, Oregon and Washington—as well as in other market areas.

3. In order to meet this demand, Chevron plans to begin construction in March 1982 of an improvement to the Richmond refinery known as the Richmond Lube Oil Project. The Richmond Lube Oil Project has two primary goals: (1) reduce Chevron's dependence on foreign crudes by enabling its Richmond refinery to manufacture high V.I. lube base oils from all domestic crudes; (2) enable Chevron to manufacture high V.I. lubricating oils more efficiently by replacing old equipment installed in the late 1930's with modern energy-efficient equipment.

4. Chevron estimates that this project will cost in excess of $500,000,000. Based on discussions with agency officials

and progress to date Chevron expects to obtain all necessary permits in February 1982 from the Bay Area Air Quality Management District ("Bay Air District") and the City of Richmond. Chevron plans to begin construction in March 1982 immediately after obtaining these permits. Chevron estimates that the Richmond Lube Oil Project will begin operating 27 months after construction begins. Therefore, operation of the Richmond Lube Oil Project will not have any effect on air quality until, at the earliest, June 1984. When completed, the Richmond Lube Oil Project will create 45 additional full time jobs. At its peak, construction of the project will require 1200 full time workers.

5. The Bay Air District has issued preliminary notice of intent to grant a permit authorizing the construction of the Richmond Lube Oil Project. A true copy of the summary of analysis prepared for this permit by the Bay Air District and distributed for public comment is attached to this declaration as Exhibit A.

6. The Bay Air District recognized (and required) in its notice of intent to issue its permit that the Richmond Lube Oil Project will use the "best available control technology" (equivalent to Federal "lowest receivable emission rate") to minimize the release of air contaminants into the atmosphere.

7. Moreover, as summarized in Table One on page three of the Bay Air District's analysis, the Richmond Lube Oil Project would result in a net decrease in emissions into the atmosphere. Specifically, the Bay Air District estimates that emissions of sulphur dioxide would decrease by 45.52 pounds per hour, nitrogen oxide by 15.27 pounds per hour, carbon monoxide by 10.85 pounds per hour, hydrocarbons by 18.22 pounds per hour and particulate matter by 4.20 pounds per hour. Thus, contrary to petitioners' assertion that the "proposed permit fails to mandate greater-than-even offsets" (Memorandum in Support of Petitioners' Motion for a Stay and for Other Relief Pending Review, page 25), there would be less emissions into the air from the Richmond Refinery after construction of the Richmond Lube Oil Project than before.

8. In any event, the air in and around the Richmond Refinery meets all primary Federal ambient air quality standards, as indicated in the San Francisco Bay Area Annual Air Quality Report for 1980, dated July 1981, prepared by the Association of Bay Area Governments, Bay Area Air Quality Management District and Metropolitan Transportation Commission. True copies of the maps from the Report showing such attainment is attached to this declaration as Exhibit B (we have shaded the actual attainment areas green and actual nonattainment areas red).

9. The timetable for permitting the Project is critical. The Bay Air District air permit public comment period closes December 20, 1981, and the air permit will be issued following completion of the project Environmental Impact Report ("EIR"). A true copy of the Proposed Schedule for the project EIR is attached to this declaration as Exhibit C. Even a one or two week stay would disrupt this schedule, resulting in delays far beyond the length of the stay ordered by the Court.

10. Chevron would be substantially and irreparably injured if construction of the Richmond Lube Oil Project were delayed pending a final decision by the Court in the instant litigation:

(a) A delay in construction would entail substantial loss to Chevron as a result of rising costs for labor, equipment and materials. Chevron has already suffered an estimated $6,000,000 in additional costs due to the postponement of construction start up from October 1981 to March 1982. Chevron estimates that an additional delay of six months would result in $6,000,000 additional construction costs. A delay of one year would result in engineering inefficiencies and added construction costs amounting to $25,000,000.

(b) In order to keep the projects on schedule, Chevron has already placed orders for much of the material and equipment necessary to begin construction in March 1982. A delay in construction would require Chevron to either cancel these orders or pay for storage of the equipment ordered. Chevron estimates that the loss entailed by such cancellation and storage costs would be in excess of $50,000,000.

(c) Chevron estimates that the Richmond Lube Oil Project will generate an additional $300,000 in revenue per day when it becomes fully operational. A delay in construction would result in a loss of revenue at this daily rate until the project begins production.

(d) As a result of the inability of the existing Chevron Richmond Refinery to meet increased demand for high V.I. lubricating oil, Chevron's share of the market for this product would decline significantly if the Richmond Lube Oil Project is not completed as scheduled in June 1984 and Chevron were unable economically to purchase a continuing supply of base stocks. Even if the Richmond Lube Oil Project is completed at a later time, Chevron probably would be unable to fully recapture its prior share of the market because its competitors would have had time to solidify their relationships with customers which Chevron was unable to service due to its limited production capacity.

(e) Chevron has already spent approximately $45,000,000 on the engineering and design of the Richmond Lube Oil Project. If construction is substantially delayed, it is highly probable that Chevron would be forced to revise a substantial portion of these engineering and design plans. The engineers and designers of the Richmond Lube Oil Project would then have to be laid off or reassigned, and Chevron would incur further costs and delays to reassemble the project engineer and design team.

Executed under penalty of perjury this 14th day of December, 1981 at San Francisco, California.

Robert S. Proctor

Exhibit A

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109

SUMMARY OF ANALYSIS
CHEVRON LUBE OIL PROJECT
Permit Application #27797

November 10, 1981

by the Staff of the BAAQMD

* * *

TABLE 1
EMISSION SUMMARY

Source	SO_x (as SO_2) Lb/Hr	NO_x (as NO_2) Lb/Hr	CO Lb/Hr	VOC Lb/Hr	Part. Matter Lb/Hr
Current Baseline[1]	−0.50	−26.05	−2.18	−1.37	−1.28
Increases from Project[2]	14.05	64.99	13.58	50.05	5.20
Reductions from Project[3]	−59.07	−54.21	−22.25	−66.90	−8.12
Increases from Additional Crude Oil[4]	—	—	—	—	—
Cumulative Net Change	−45.52	−15.27	−10.85	−18.22	−4.20

[1] The basis for the Refinery current baseline is from permitted new and modified sources since 12/20/77 and is recorded in past correspondence.

[2] As shown in Table 2, these increases are from the proposed new and modified plants and increases elsewhere in the Refinery caused by the project, except for processing more crude oil.

[3] As shown in Table 3, these reductions are from shutting down old plants, burning less fuel oil, and providing better CO control at the PA Plant.

[4] Any possible increase of emissions due to additional crude oil processing will be offset by reductions from within the refinery. These reductions which are part of the bubble will be outlined in the Environmental Management Plan.

* * *

[Exhibits B and C omitted in printing]

2. Declaration of Milton Feldstein In Opposition To Petitioners' Motion For A Stay And For Other Relief Pending Review (December 22, 1981)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
1725 I Street, N.W., Suite 600
Washington, DC 20006

CITIZENS FOR A BETTER ENVIRONEMENT, INC.,
59 East Van Buren, Suite 1600
Chicago, Illinois 60605

No. 81-2208

and

NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
5650 West Central, Suite B
Toledo, Ohio 43615

Petitioners,

v.

ANNE M. GORSUCH,
ADMINISTRATOR,
U.S. Environmental Protection Agency
401 M. Street, S.W.
Washington, DC 20640

Respondent.

I, MILTON FELDSTEIN, do hereby declare and testify as follows;

1. I am the Air Pollution Control Officer for the Bay Area Air Quality Management District ("District"). In that capacity, I am responsible for the management of the District, including the implementation of the District's new source review rules and its air quality planning process.

2. A true copy of the District's permit rules is attached hereto as Exhibit A. These permit rules have been developed over a period of approximately nine years and are generally regarded as among the most stringent in the country. This latest version was approved by the District's Board of Directors on October 7, 1981. This latest version is, in numerous respects, more stringent than earlier versions of the District's permit rules albeit less stringent than petitioner Citizens For A Better Environment urged the Board of Directors to adopt. On November 16, 1981, Region IX of the U.S. Environmental Protection Agency stated that the latest version of the rules has been found approvable under the Clean Air Act and commended the staff of the District of its work in developing the rules. Moreover, Region IX stated it was preparing an approval package for submission to EPA's Washington headquarters for concurrence and publication. Prior to the review and approval of those rules by Region IX of EPA, the State of California Air Resources Board had reviewed this latest version of the rules, determined that it satisfied the requirements of the Clean Air Act and submitted it to Region IX of EPA for inclusion in the State Implementation Plan.

3. The Petitioners' Motion for a Stay and their Memorandum in Support of said Motion contain numerous errors and misstatements relative to the latest version of the District's permit rules as approved by the District's Board of Directors on October 7, 1981.

4. The petitioners' allegations are incorrect in all of the following particulars: (1) that the District's permit rule does not provide for greater-than-even emission offsets (Memorandum in support of Stay at p. 24); (2) that it will not accomplish a net reduction in the area's pollution (Memoran-

dum, p. 24); (3) that when a new installation is built, the District requires only enough offsetting reductions to hold the emissions increase below certain threshold levels (Memorandum, p. 24); (4) that the permit rule shares the alleged defect of the new federal definition of "source" and thereby allows a continual increase in pollution with each additional project (Memorandum, p. 24); and (5) that a proposed permit to Chevron USA fails to mandate greater-than-even offsets (Memorandum, p. 25).

5. The District's new source review does in fact require either 2:1 or 1.2:1 offsets in all cases involving emission increases more than 250 lb/day, unless such increased emissions will not interfere with the attainment or maintenance of any national ambient air quality standard. (See Sections 2-2-303 and 2-2-304 of attached rule for the specific offset requirements.) Moreover, contrary to petitioners' suggestion, this rule does not allow "continual increases"; in fact, this rule requires that all cumulative increases in emissions from a given facility which accrue more than 250 lb/day (or 550 lb/day of NO_x) over a specified period of time (see Section 2-2-203 or the attached Rule for the definition of "cumulative increase," which sets forth the relevant criteria) must be offset in accordance with the requirements of Sections 2-2-303 and 2-2-304 of the attached Rule.

6. In those cases where a facility seeks to obtain a permit for a new or modified source under the "bubble" concept, which requires that the modified facility taken as a whole will emit no more after the modification than it did before, a net reduction in emissions will also occur in virtually all cases. This results since the maximum emissions allowed by the permit on the modified facility will be based on the actual emissions from the old facility, averaged over a period of years, or "baseline." Thus, unless the modified facility operates at all times at a level equivalent to maximum baseline emissions, there will inevitably be some reduction in emissions from the modified facility.

7. The petitioners incorrectly allege that the "breathing public (sic) in the Bay Area is being harmed by the excess

pollution to come from new facilities like Chevron's" (Memorandum p. 26). A true and correct copy of the District's Summary of Analysis of the Chevron Lube Oil Project (the proposed "new facilities" referred to by petitioners) is attached hereto as Exhibit B. This Summary of Analysis (which was duly noticed and distributed for public comment a little over one month ago) specifically contradicts petitioners' allegations. Indeed, our preliminary analysis of Chevron's proposal (as summarized in Table One on page three of Exhibit B) shows that this project will actually result in a net decrease in emissions to the Bay Area atmosphere. Specifically, we estimate that emissions of sulfur dioxide would decrease from Chevron's refinery by 45.52 pounds per hour, nitrogen oxide by 15.27 pounds per hour, carbon monoxide by 10.85 pounds per hour, hydrocarbons by 18.22 pounds per hour and particulate matter by 4.20 pounds per hour. The District is continuing to review some relatively minor data revisions to be submitted by Chevron and will issue an up-dated Summary of Analysis after completion of this review.

8. A greater-than-even intra-plant offset requirement, as requested by Petitioners, would not significantly assist attainment of any ambient air quality standards in the Bay Area. For example, since December 20, 1977 the total reduction in emissions attributable to the new source review aspect of the District's permit rule has amounted to a reduction of emissions totaling about 2.5 tons per day of hydrocarbons. If it were assumed that the ratio proposed by petitioner Citizens For a Better Environment to the District's Board of Directors (i.e., a 20% discount) were used and that it was applicable to the total reduction, the total reduction would have been increased by only about 0.5 tons per day. Moreover, testimony presented by other parties to the District's Board of Directors indicated that such a ratio would encourage industry to operate old polluting sources longer and would therefore be counterproductive.

9. An automobile inspection and maintenance program is of far greater importance to air quality planning in the San

Francisco Bay Area. Such a program is estimated to reduce emissions of hydrocarbons by 45 tons per day in the Bay Area. The District is vigorously endeavoring to obtain approval of such a program from the California Legislature.

10. The District strongly opposes the requested stay of EPA's approval of the District's permit rules. As noted above, these rules have heretofore been approved by the District's Board of Directors, the California Air Resources Board, and Region IX of EPA. Any stay of official EPA approval of these rules, or any other indication that the California SIP needs any substantial additions beyond legislative authorization of a vehicle inspection and maintenance program, could seriously impair the likelihood of obtaining any legislative authorization for such a program.

Executed under penalty of perjury this 22nd day of December, 1981, at San Francisco, California.

Milton Feldstein

[Exhibits omitted in printing]

3. Declaration Of Jeffrey Gabe In Support Of Petitioners' Motion For A Stay And For Other Relief Pending Review (January 5, 1982)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., — No. 81-2208

Petitioners,

v.

ANNE M. GORSUCH,

Respondent,

ALABAMA POWER COMPANY, et al.,

Applicant-intervenors

I JEFFREY GABE, under penalty of perjury do say:

1. I am employed by Citizens for a Better Environment (CBE) and serve as the Research Director of the San Francisco office where one of my major responsibilities is to represent CBE in matters pertaining to air quality. As a part of my activities in this regard I monitor permit activities at the Bay Area Air Quality Management District and the general progress of the Bay Area towards attaining and maintaining ambient air quality standards.

2. The entire Bay Area is currently designated as nonattainment for the federal primary standards for ozone and carbon monoxide. The ozone problem is considered to be a regional one. Emissions of ozone precursors (hydrocarbons and nitrogen oxides) anywhere in the air basin are considered to contribute to excesses of the ozone standards that occur in other portions of the air basin or adjoining air basins. The Bay Area's Air Quality Plan, which constitutes the Bay Area's contribution to the California State Implementation Plan, has adopted a regionwide hydrocarbon reduction and nitrogen oxide maintenance strategy as the means of attaining and maintaining the federal ambient air quality standard for ozone.

3. According to the 1979 Emissions Inventory compiled by the BAAQMD, the Chevron Richmond Refinery is the largest stationary source of hydrocarbons and the third largest stationary source of nitrogen oxide emissions in the Bay Area. Even though the federal ozone standard may not be exceeded in the area immediately adjacent to the Chevron refinery, emissions from the refinery contribute to the ozone nonattainment problems in other portions of the Bay Area as well as the adjoining Sacramento air basin. EPA recognizes the regional impact of emissions on air quality through its requirement for ozone modeling 15–40 kilometers from urbanized areas (see 46 Federal Register 7192 of "State Implementation Plans; Approval of 1982 Ozone and Carbon Monoxide Plan Revisions for Areas Needing an Attainment Date Extension; and Approved Ozone Modeling Techniques; Final Policy and Proposed Rule-Making," 46 Federal Register 7182, January 22, 1981).

4. I am familiar with the BAAQMD's new source review rule and have participated in numerous workshops and hearings surrounding its development during the last three years. I have also reviewed the application of these rules, on a case-by-case basis, to individual projects and have read the declarations of Milton Feldstein and Robert Proctor in this case.

5. BAAQMD rules do not, in practice, require that the modification or expansion of an existing stationary source provide for greater-than-even emission offsets or accomplish a net reduction in the area's pollution. In practice, the requirement for greater-than-even offsets applies only to pollution from entirely new sources of air pollution which are not associated with any existing sources.

6. As far as the offset requirement is concerned, the definition of a source used by the BAAQMD to determine whether greater-than-even offsets are needed is, and has been, the "plantwide" definition adopted by the EPA on October 14, 1981. The "dual" definition which was required by EPA prior to October 14, 1981, was never used by the BAAQMD to require greater-than-even offsets.

7. According to section 2-2-203 of BAAQMD regulations (see page 2-2-6 of Exhibit #1 attached hereto) greater-than-even offsets pursuant to section 2-2-304 (see page 2-2-7, Exhibit #1) are not required unless the "cumulative increases" of hydrocarbon, particulate, sulfur oxide or carbon monoxide exceed 250 pounds per day or 550 pounds per day for nitrogen oxides. "cumulative increases" are calculated pursuant to section 2-2-203 (see page 2-2-4, Exhibit #1). This procedure yields a figure that is the difference between emission increases and decreases "during the preceding five years or since December 20, 1977, whichever period is shorter. . . ." Until this difference exceeds 250 pounds per day (or 550 pounds per day for nitrogen oxides) the offset requirement of section 2-2-304 does not come into play even though the absolute increases from the proposed modification exceed the cutoff level.

8. In effect, each stationary source in the BAAQMD is allowed to be modified and increase its net emissions by 250 pounds per day (or 550 pounds per day of nitrogen oxides) without providing offsets. Furthermore, because of the 5 year sunset clause used in the determination of cumulative increases, BAAQMD rules allow emissions at existing stationary sources to increase by these quantities due to modifications every five years without the need for offsets. When this potential for continual, incremental increases is multiplied times the thousands of sources of air pollution in the Bay Area the opportunity for significant adverse impacts on air quality is substantial.

9. A simple example will serve to illustrate the application of the BAAQMD's rules to a particular project. Let us assume that an oil company wishes to modify an existing oil refinery in the Bay Area. Let us also assume that the increased hydrocarbon emissions associated with this modification amount to 1000 pounds per day. As long as the project applicant is also able to decrease emissions at its existing refinery by at least 750 pounds per day, it will not have to offset the remaining increased load to the atmosphere, which can amount to as much as 250 pounds per day. According to District

rules, five years later the process could be repeated and an additional 250 pounds per day of hydrocarbons could be added to the atmosphere.

10. In contrast, if an oil company that did not operate a refinery in the Bay Area wanted to build a project that would emit 1000 pounds per day of hydrocarbons, it would be required to find 1200 pounds of hydrocarbon reductions, thus providing a 200-pound net reduction in Bay Area emissions. In five years, however, that facility too could increase its emissions by an additional 250 pounds per day, thus erasing the benefit it had previously provided.

11. Most permit activity for major sources in the Bay Area and nationwide involves modifications at existing industrial operations rather than the creation of entirely new operations. Since December, 1977, there has been only one construction permit issued for an entirely new major source in the Bay Area. In contrast, during that same time span, 46 construction permits for major modifications to existing major sources have been issued. According to EPA reports of offset activity, a similar trend is seen nationwide. (See, for example, USEPA's "Emission Offsets, Banking and Trading Update—February, 1980.")

11b. Thus, the use of a "plantwide" definition of source will greatly reduce the number of new sources that are actually subject to any of the Clean Air Act requirements associated with the granting of a permit to a new source. In the Bay Area, which has an ozone nonattainment plan that predicts a hydrocarbon reduction of 32 tons per day from new source review, a "plantwide" definition of source seriously undermines the ability of new source review to provide any reductions at all, let alone the 32 tons per day that have been promised.

11c. Individual states or air districts cannot be relied upon to use the "dual" definition even in the face of their continuing inability to meet ambient air quality standards. For example, at its December 16, 1981, meeting, the BAAQMD Board of Directors considered a CBE proposal to adopt a policy of greater-than-even offsets for modifications to existing sources.

Board Member Rod [sic] Diridon explained his vote against such a policy when he said:

> The action [CBE's proposal] would tend to put local industry potentially at a competitive disadvantage to some other areas of the nation and possibly in California. That may or may not be a significant impact, but it's a fact that must be considered. (Transcribed from the BAAQMD tape of the hearing.)

In spite of the fact that the measures contained within the Bay Area's Air Quality Plan no longer predict attainment of the federal ambient air quality standard for ozone, the BAAQMD Board, which is reputed to be a very environmentally conscious body, failed to approve CBE's proposal for greater-than-even offsets.

12. The question of "When is a source not a source?" is not just an abstract one. There are concrete examples. I have reviewed the BAAQMD's permit files on Chevron Oil Company's application for an Authority to Construct its proposed Richmond Lube Oil Project (#27797) and submitted comments to the BAAQMD on its preliminary decision to issue Chevron an Authority to Construct for this project. (See Exhibit #2 attached hereto.) The District's analysis and proposed permit (see Exhibit #3 attached hereto) provide concrete examples of the adverse air quality impacts associated with a "plant-wide" source definition.

13. Based upon my review of the materials contained within the Chevron permit file the preliminary decision of the BAAQMD will not require that the emissions from the modified refinery are less than those during the refinery's baseline period. The permit evaluation itself states that the refinery emissions will be limited to 'no net increase.' (See section C., page 3, Exhibit #3.) Were the "dual" definition of source to be applied to the proposed modification, there would be a net decrease of emissions from the project rather than merely maintaining emissions at current levels. Looking at hydrocarbons, for example, and assuming 1.2 pounds of reductions for every pound of increased emissions to the air basin, emissions would have to be reduced by 43.8 tons per

year. (Based upon 50.05 pounds per hour of hydrocarbon increases. See Table #1, page 3, Exhibit #3 "Increases from Project.")

14. Instead, notwithstanding the declarations of Milton Feldstein and Robert Proctor, no decreases are required. As originally proposed on November 10, 1981, in the BAAQMD's preliminary permit decision, there would be a "cumulative net" decrease of emissions due to the project. (See Table #1, page 3, Exhibit #3, "Cumulative Net Change.") However, these "decreases" do not take into account potential increases elsewhere in the refinery due to the processing of more crude oil. (See footnote #2 to Table #1, page 3, Exhibit #3.)

15. In addition, as noted in paragraph #7 above, these cumulative changes are not necessarily permanent reductions in emissions. For the next five years they can be applied as credit towards future increases in order to avoid providing greater-than-even offsets.

16. In fact, this has happened already. Chevron has requested that its allowable emission limits in the proposed permit be increased to include their cumulative emission balance. (See Exhibit #4 attached hereto.) Nearly all of the adjustments requested by Chevron in that letter are from the "Cumulative Net Change" found in Table #1, page 3, Exhibit #3. Looking at VOC (hydrocarbon) emissions for example: 18.22 pounds per hour = 79.8 tons per year compared with Chevron's request for an 81.4 ton per year adjustment.

17. The District responded to Chevron's request by increasing its allowable emissions by the requested values. (See Exhibit #5 attached hereto which was given to me by the BAAQMD permit engineers evaluating the project.)

18. Moreover, while "the 'bubble' concept" may require "that the modified facility taken as a whole will emit no more after the modification than it did before. . . ." (See declaration of Milton Feldstein pp 3–4.) the new source review rule does not appear to do so on its face as was discussed above in paragraphs 7 and 8. In fact, Chevron has attempted to determine its emission limits in a fashion that would allow its

monthly emission limits to increase above baseline levels by the maximum allowable "cumulative increase" that still avoids the requirement for greater-than-even offsets. (See Attachment II to Exhibit #6 attached hereto. Marginal notes found on Exhibit #6 apparently belong to the reviewing engineer, Swanson, and are presumable not on the original letter sent to Mr. Feldstein.)

19. It should also be remembered that the Bay Area is nonattainment for the federal ambient air quality standard for ozone which is a short-term (hourly) standard. The proposed Chevron permit does not contain limits on total short-term emissions from the refinery and associated wharf activities which are capable of protecting the ozone standard. Chevron must meet only monthly and annual emission limits from its refinery operation while wharf operations are limited only on an annual basis. Since emissions from the refinery and associated marine activities are not constant, monthly or annual emission limits do not guard against excessive peak emissions. Thus, under the proposed permit the short-term impact of Chevron's modified facility can exceed its historical impact in the baseline period.

20. The use of monthly and yearly emission averaging periods for plantwide emissions is a recent departure from previous District permits which used short-term emission limits and operational constraints on individual pieces of equipment.

21. Chevron asserts that "it would be substantially and irreparably harmed" due to a stay in this case even if it were only for a week or two. (See Declaration of Robert Proctor, page 5, paragraphs 9 and 10.) The credibility of such assertions is diminished by the fact that Chevron itself has injected additional delays into the permit proceedings at the BAAQMD.

22. In early December, after Chevron's application had been deemed complete for over three months and after the BAAQMD had finished its analysis of the application and issued its preliminary decision, Chevron proposed to submit a modified analysis of marine emissions which might affect baseline levels. This analysis will not be submitted to the

BAAQMD until January 4, 1982. (See Exhibit #7 attached hereto.)

23. The BAAQMD has agreed to accept Chevron's submittal for review and evaluation by its staff (See Exhibit #8 attached hereto.), a process I am told will take at least several weeks and could take several months. Subsequent to the BAAQMD's evaluation it intends to reopen the public comment period on the permit.

24. Moreover, Chevron has made assertions of economic hardship in the past. For example, in March 1981 they stated that, "The Project's economic attractiveness may diminish rapidly if start of construction is delayed beyond September 1981." (See Exhibit #9 attached hereto.) Even without the delays engendered by Chevron's new submittal to the BAAQMD construction is not scheduled to begin until March of 1982. Yet the project goes on. Given the highly profitable nature of the project we view such statements as aggressive corporate posturing intended to encourage environmental neglect and laissez-faire regulation on the part of public officials.

25. Chevron has reportedly gone so far in this regard as to use a form of economic blackmail, threatening to move the Project from Richmond to its refinery in Pascagoula, Mississippi, if it had difficulty securing the necessary permits (see Exhibit #10 attached hereto).

26. If a stay is not issued in this case, Chevron could conceivably initiate and complete construction of a facility which did not need to provide greater-than-even offsets. Identifying and providing these offsets after the plant begins operation could be a difficult, time-consuming and costly task. In any event, the public would suffer irreparable harm during the time between the initiation of the plant's operation and the achievement of the additional emission reductions.

27. In addition unless a stay is issued, Chevron and other industries previously affected by the construction moratorium will have little incentive to help implement control measures like vehicle inspection and maintenance, which are needed to improve air quality in California. One reason why California's

SIP has not yet been approved by the EPA is that the state legislature has failed to pass enabling legislation for vehicle inspection and maintenance. As a result, there has been a construction ban on major sources or air pollution in many areas of California. That ban has affected the proposed Chevron project. (See Exhibit #11 attached hereto.) But, if EPA does not now consider the Chevron project to be a source of pollution, then in EPA's eyes that ban does not apply. Thus, the new definition of a source threatens the improved air quality that would result from the timely implementation of a vehicle inspection and maintenance program to the extent that it enables Chevron and other previously affected industries to avoid the constraints of the construction ban and relax whatever efforts have been made in support of vehicle inspection and maintenance.

28. In the past, it would presumably have been in the best interests of Chevron and other affected industries to encourage the passage of inspection and maintenance legislation. However, industry's commitment to such a program was criticized at the December 16, 1981 meeting of the BAAQMD Board of Directors by Rod Diridon, a member of the Board and a Supervisor from Santa Clara County. Speaking to a room filled predominantly with industry representatives (including several from Chevron), Mr. Diridon said:

> There's a difference between giving lip-service to the process and getting up there and letting the legislators know that it's a life-or-death issue. . . . The point here is that if all of these organizations had been up there last year with the amount of pressure on the legislature that you have attempted to bring on this issue here today, SB 33 [a bill for establishing an inspection and maintenance program] would have passed last year. You have the potential for having a consortium in Sacramento that would guarantee the passage of SB 33, but instead we sit here fighting. . . . (Transcribed from BAAQMD tape of hearing)

To the extent that Chevron and other industries affected by the construction ban have not exerted strenuous efforts in support of the passage of an inspection and maintenance

program, they have sown the seeds of their own difficulties and cannot claim powerlessness over their own fate.

Executed this 5th day of January, 1982, in San Francisco, California.

Jeffrey Gabe

[EXHIBITS NO. 1–9 Omitted]

EXHIBIT #10

Second choice for Chevron refinery

By Andy Jokelson
Tribune Staff Writer

EL CERRITO—Chevron U.S.A. Tuesday formally announced that it hopes to begin construction by Oct. 1 on a $440-million replacement for its current Richmond plant that makes lubricating oil ingredients.

But if the subsidiary of Standard Oil Co. of California doesn't get the necessary government approvals for the project, Chevron U.S.A. president Kenneth Derr said the company would probably add such a plant to its Pascagoula, Miss. refinery.

The proposed new Richmond plant would replace 40-year-old facilities that are used to produce "base stocks" that go into the manufacture of lubricating oils.

Chevron is currently prevented from going ahead with the Richmond project by a Federal Environmental Protection Agency construction ban imposed on California because the state has not established a program for emission inspections of older vehicles.

Derr said the impasse could be resolved if the state legislature approves a vehicle inspection and maintenance program. Or the EPA could modify its interpretation of the federal Clean Air Act that led to the construction ban. Or Congress can change the law, Derr said.

"We are optimistic these issues can be resolved," he told the Council of Richmond Industries in a speech Tuesday.

The new Richmond project would also need a permit from the Bay Area Air Quality Management District.

Derr said, "We don't see any environmental problems in the construction of this facility." He said. "There should be no increase in air emissions. In fact, there should be a decrease."

Derr told a news conference before his speech that if Chevron doesn't get necessary permits soon for the Richmond site, "we may have to stop work" on the project. The company has already spent $5 million planning the project.

He added, "if we can't do it in Richmond, I would think we would do it in Mississippi."

Chevron estimates the project would create about 1,200 construction jobs and about 50 permanent new jobs at the refinery. The company hopes to have the new plant operating in 1984.

From East Bay Today
15 April 1981